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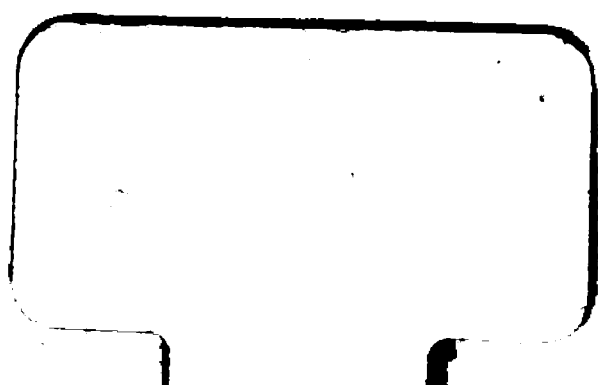
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***American Political History***  
**1763-1876**

By ALEXANDER JOHNSTON

Edited and Supplemented by James Albert Woodburn,  
Professor of History and Political Science,  
Indiana University

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*In Two Volumes. Octavo*  
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1. **The Revolution, the Constitution, and the  
Growth of Nationality. 1763-1832**
2. **The Slavery Controversy, Secession, Civil  
War, and Reconstruction. 1820-1876**

# AMERICAN POLITICAL HISTORY

1763-1876

BY

ALEXANDER JOHNSTON

EDITED AND SUPPLEMENTED BY

JAMES ALBERT WOODBURN

PROFESSOR OF AMERICAN HISTORY AND POLITICS  
INDIANA UNIVERSITY

*IN TWO PARTS*

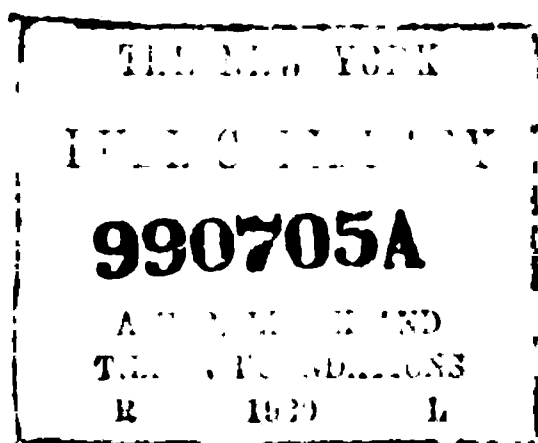
II

THE SLAVERY CONTROVERSY, CIVIL WAR AND  
RECONSTRUCTION, 1820-1876

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G. P. PUTNAM'S SONS  
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**THE SLAVERY CONTROVERSY**  
**1820–1860**



# The Slavery Controversy

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## CHAPTER I

### SLAVERY IN THE UNITED STATES

**I**T may be laid down as a fundamental proposition, that negro slavery in the Colonies never existed or was originally established by law, but that it rested wholly on custom. The dictum, so often quoted, that slavery, being a breach of natural right, can be valid only by positive law, is not true: it is rather true that slavery, where it existed, being the creature of custom, required positive law to abolish or control it.

In Great Britain, in 1772, custom had made slavery so odious that the *Sommersett* case justly held that positive law was necessary for the establishment of slavery there in any form; but the exact contrary of this rule, of course, held good in commonwealths where custom made slavery not odious, but legal. In these cases the laws which were passed in regard to slavery were only declaratory of a custom already established, and cannot be said to have established slavery.

The whole slavery struggle is therefore the history of a custom at first universal in the Colonies, then peacefully circumscribed by the rise of a moral feeling opposed to it, but suddenly so fortified in its remaining territory by

the rise of an enormous material interest as to make the final struggle one of force.

In outlining the history of negro slavery in the United States, it seems advisable to make the following subdivisions: 1, the introduction of slavery, and its increase; 2, its internal policy; 3, the slave trade, foreign and domestic; 4, the suffrage clause and the "slave power"; and 5, slavery in the Territories, including new States. The final abolition of slavery in each State, in the Territories, and in the nation, is treated elsewhere.<sup>1</sup>

I. INTRODUCTION OF SLAVERY, AND ITS INCREASE.—When English colonization in North America began, Indian and negro slavery was already firmly established in the neighboring Spanish Colonies; and from these, particularly from the West Indies, negro slavery was naturally and unconsciously introduced into the English Colonies, the Barbadoes being the stepping-stone for most of them. Nevertheless, the first authentic case of introduction was from an entirely different source. In August, 1619, a Dutch man-of-war, temporarily in Virginia, landed fourteen negro slaves in exchange for provisions. This is the only Colony in which a first case can be found. Everywhere else we find slavery, when first casually mentioned, an institution so long established as to have lost its novelty.

In each of them there are three points to be noted: the first mention of slavery, its first regulation by law, and the establishment, by custom or positive law, of the civil law rule, *partus sequitur ventrem*, instead of the common law rule, *partus sequitur patrem*. The latter rule, making children take the condition of the father, was the natural rule for English colonists, would have made negro slavery far more tolerable, and would have established a constant agent for its ultimate extinction, since any connection between a slave father and a free mother would have

<sup>1</sup> See Abolition.

been comparatively rare. The former rule, that the children should take the condition of the mother, which was everywhere adopted by custom from the beginning, not only relieved the system from check, but even gave it an added horror, of which the variations in color among the inferior race are mute but indelible certificates.

In summarizing the introduction of slavery into the original thirteen States, we will begin at Mason and Dixon's line, going first southward, and then northward: its introduction into the new States and Territories comes under the fifth subdivision.

In Virginia the acts passed were at first for the mere regulation of servants, the legal distinction being between servants for a term of years (white immigrants under indentures), and servants for life (slaves). December 14, 1662, the civil law rule, *partus sequitur ventrem*, was adopted by statute. October 3, 1670, servants not Christians, imported by shipping, were declared slaves for their lives. Slavery was thus fully legalized in the Colony.

In Maryland slaves are first mentioned ("slaves only excepted") in a proposed law of 1638. In 1663, the civil law rule was fully adopted by a provision that "negroes or other slaves," then in the province or thereafter imported, should serve *durante vita*, "and their children also."

In Delaware the Swedes at first prohibited slavery, but it was introduced by the Dutch. It was in existence probably in 1636; but its first legal recognition was in 1721, in an act providing for the trial of "negro and mulatto slaves" by two justices and six freeholders. With this exception the system rested wholly on custom in Delaware.

In Carolina, under the first union of the two provinces, the Locke constitution provided practically for white slavery: the "leetmen," or tenants of ten acres, were to be fixed to the soil under the jurisdiction of their lord

without appeal; and the children of leetmen were to be leetmen, "and so to all generations." This provision, like most of the others, was never respected or obeyed. The 110th article provided that every freeman should have "absolute power and authority over his negro slaves of what opinion or religion soever." This met with more respect, and became the fundamental law of North Carolina without anything further than statutes for police regulation.

In South Carolina the first slavery legislation, an act of February 7, 1690, "for the better ordering of slaves," took place before the separation. Slaves are said to have been introduced by Governor Yeamans about 1670. June 7, 1712, slavery was formally legalized by an act declaring all negroes and Indians, theretofore sold or thereafter to be sold, and their children, "slaves to all intents and purposes." The civil law rule was made law May 10, 1740. The police regulations of this Colony were filled with cruel provisions, such as the gelding of a male slave who should run away for the fourth time; and yet an act was passed in 1704, and re-enacted in 1708, for enlisting and arming negro troops.

In Georgia slavery was prohibited at the establishment of the Colony, in 1732. In 1749, after repeated petitions from the colonists, the trustees obtained from Parliament the repeal of the prohibition. In 1755 the legislature passed an act regulating the conduct of slaves; and in 1765 and subsequent years the laws of South Carolina were re-enacted by Georgia.

In Pennsylvania slavery is first heard of in 1688, when Francis Daniel Pastorius drew up a memorial against the practice for the Germantown Quakers. It was not until 1696 that the Quaker yearly meeting was prepared to act favorably on the memorial. In 1700 the legislature forbade the selling of slaves out of the province without their consent. The other slavery legislation of the Colony

consisted of efforts, more or less successful, to check or abolish the slave trade; but as soon as independence was fairly attained, arrangements were made for gradual abolition. So late as 1795, however, the State Supreme Court decided that slavery was not inconsistent with the State constitution.

In New Jersey slavery was introduced by the Dutch, but was not recognized by law until the "concessions" of 1664, in which the word "slaves" occurs. In East Jersey slaves were given trial by jury in 1694; and in West Jersey the word "slave" was omitted from the laws. Acts for regulating the conduct of slaves began with the junction of the province with New York, in 1702; but these were never harsh, and the condition of the slave was more tolerable than in any other Colony where the system was really established.

In New York slavery came in with the Dutch at an uncertain period, the Dutch West India Company supplying the slaves. So early as 1628 the inhabitants were made nervous by the mutinous behavior of some of the slaves, but there was no legal recognition of slavery until 1665, when the Duke of York's laws forbade "slavery of Christians," thus by implication allowing slavery of heathens. Full recognition was given by a proviso in the naturalization act of 1683, that it should not operate to free those held as slaves, and by an act of 1706, to allow baptism of slaves without freeing them.

In Connecticut slavery was never directly established by statute, and the time of its introduction is uncertain. In 1680 the Governor informed the board of trade that, "as for blacks, there come sometimes three or four in a year from Barbadoes, and they are sold usually at the rate of £22 apiece." They were considered as servants, rather than as chattels, could sue their masters for ill-treatment or deprivation of property, and the only legal recognition of slavery was in such police regulations as



that of 1690, to check the wandering and running away of "purchased negro servants."

Rhode Island passed the first act for the abolition of slavery in our history, May 19, 1652. In order to check "the common course practiced among Englishmen to buy negers [*sic*]," the act freed all slaves brought into the province after ten years' service. Unfortunately, the act was never obeyed; custom was too strong for statute law, and slavery existed without law until the final abolition. The only legal recognition of the system was in a series of acts, beginning January 4, 1703, to control the wandering of Indian and negro slaves and servants, and another, beginning in April, 1708, in which the slave trade was indirectly legalized by being taxed.

In Massachusetts a negro is mentioned in 1633, as an estray, "conducted to his master." In 1636 a Salem ship began the importation of negro slaves from the West Indies, and thereafter Pequot slaves were constantly exchanged for Barbadoes negroes. In 1641 the fundamental laws forbade slavery, with the following cautious proviso: "unless it be lawful captives taken in just wars [Pequots], and such strangers as willingly sell themselves [probably indentured white immigrants] or are sold to us [negroes]." The explanations inserted will show that this was the first legal recognition of slavery in any Colony. Under it slavery grew slowly, and the rule of *partus sequitur ventrem* was established by custom and court decisions. Public sentiment, after the year 1700, was slowly developed against the system. In December, 1766, a jury gave a negro woman £4 damages against her master for restraining her of her liberty. John Adams notes at the time that this was the first case of the kind he had known, though he heard that there had been many. In 1768 another case was decided for the master, and thereafter the decisions of juries varied to every point of the compass for twenty years; but it is known that many of the

cases in which the slaves were successful were gained by connivance of the masters, in order to relieve themselves of the care of aged or infirm slaves. John Quincy Adams gives 1787 as the year in which the State Supreme Court finally decided that, under the constitution of 1780, a man could not be sold in Massachusetts.

In New Hampshire there were but two legal recognitions of slavery, an act of 1714 to regulate the conduct of "Indian, negro and mulatto servants and slaves"; and another in 1718 to regulate the conduct of masters. There were but few slaves in the Colony, and slavery had but a nominal existence.

Vermont never recognized slavery.<sup>1</sup>

From all the cases it will be seen that slavery was the creature of custom. The only exceptions are a peculiar provision in the law of Maryland (1663) and Pennsylvania (1725-6) making the children of free-born mothers and slave fathers slaves to their father's master until the age of thirty; and the laws in a few States re-enslaving freedmen who refused or neglected to leave the State. This latter provision was the law of Virginia from 1705, and was put into the State constitution in 1850; and laws fully equivalent were passed during their State existence by North Carolina, South Carolina, Georgia, Alabama, Mississippi, and Louisiana. In the white heat of the anti-slavery struggle, laws were passed by Virginia in 1856, by Louisiana in 1859, and by Maryland in 1860, providing for the voluntary enslavement of free negroes; but these were exceptional. Milder provisions, to the same general effect, to punish by fine or sale the coming or remaining of free negroes in the State, were inserted in the constitution of Missouri in 1820, of Texas in 1836 (as a republic), of Florida in 1838, of Kentucky in 1850, of Indiana in 1851, and of Oregon in 1857.

The most troublesome to the Northern States were the

<sup>1</sup> See Abolition, I.

regulations of the seaboard slave States, under which negro seamen of Northern vessels were frequently imprisoned, and sometimes sold. In 1844 Massachusetts sent Samuel Hoar to Charleston to bring an amicable suit there for the purpose of testing the constitutionality of the South Carolina act. He was received in a very unfriendly fashion. The Legislature passed resolutions requesting the Governor to expel him from the State, and an act making any such mission a high misdemeanor, punishable by fine and banishment. Finally, on receiving unequivocal assurances of personal violence if he remained, Mr. Hoar left Charleston without fulfilling his mission.

However strongly custom may have established negro slavery in the Colonies, it has been suggested that the validity of the system was at least made doubtful by the *Sommersett* case in England. In that country, in 1677, the courts held negro slaves to be property, as "being usually bought and sold among merchants as merchandise, and also being infidels." In 1750 custom had so far changed that the law was again in doubt.

In 1771 Charles Stewart, of Boston, took his slave James *Sommersett* to London, where the latter fell sick, and was sent adrift by his master. Stewart, afterward finding *Sommersett* recovered, reclaimed him and put him on a ship in the Thames, bound for Jamaica. Lord Mansfield issued a writ of *habeas corpus*, and decided, June 22, 1772, that the master could not compel his slave to leave England, whose laws did not recognize "so high an act of dominion." If the Colonies, by charter and otherwise, were forbidden to pass laws contrary to the laws of England, and if the laws of England did not recognize slavery, was slavery legal in the Colonies?

It must be remembered that the *Sommersett* decision was not that the laws of England forbade slavery, but that there was no law in England establishing slavery.

There was no attempt to make an English custom override an American custom, and we cannot draw any attack on the American system of slavery out of the *Sommersett* case.

The Colonies, then, began their forcible struggle against the mother country with a system of negro slavery, recognized everywhere by law, moribund in the North, but full of vigor in the South. In the North, where there was a general consciousness that slavery was doomed, the slaves were generally regarded as servants for life, as persons whose personality was under suspension. In the South they were regularly regarded by the law and by private opinion as things, as chattels, with "no rights or privileges but such as those who held the power and the government might choose to grant them," with all the consequences arising from the fact that they had not come to America voluntarily, as persons, but involuntarily, as property. In so far the *Dred Scott* decision correctly stated the feeling of our forefathers.

But the feeling was in a great measure a consequence of the unfortunate adoption of the rule *partus sequitur ventrem*: a race to which the rule was applied could be no other than animal, and a people among whom the rule prevailed could never be emancipated from the feeling. For this reason the Revolutionary Congress made no attempt to interfere with slavery, except in regard to the slave trade, to be referred to hereafter.

The state of war itself did little real harm to the system. In Virginia, November 7, 1775, Lord Dunmore proclaimed freedom to all slaves who would fight for the King, and negro soldiers were enlisted by Massachusetts, Connecticut, Rhode Island, New York, Pennsylvania, Maryland, Virginia, and North Carolina. South Carolina refused to follow the recommendation of Congress, in 1779, to enlist three thousand negro troops. A return of the Continental army, August 24, 1778, shows 755

negro soldiers, not including the New Hampshire, Rhode Island, Connecticut, or New York troops. At the end of the war Rhode Island, New York, and Virginia freed their negro soldiers, but the system remained as before. The treaty of peace bound the British not to carry away any "negroes or other *property* of the American inhabitants"; and this collocation of terms is repeated in the treaty of Ghent in 1814.

All through the period of the Confederation, slavery received no detriment, except in the action of individual States,<sup>1</sup> and in its exclusion from the Northwest Territory, to be referred to hereafter. The States and the nation began their course under the Constitution with the same general system as before, but with three modifications: the apportionment of representation to three-fifths of the slaves; the power of Congress to prohibit the slave trade after 1808; and the fugitive slave clause.

The first of these made the system of slavery itself a political factor, represented in the government; the third offered a tempting and dangerous weapon to use against an opposing section; and the second was the death warrant of the whole system in the double event of the acquisition of foreign territory and the development of antagonistic sections. They are therefore treated in special subdivisions.

Until this time the difference in the slave systems of the North and of the South had been a difference of degree rather than of kind. The basis and the general laws were nominally the same everywhere; and there was a general agreement that the system was evil in itself, and that it was desirable to rid the country of it by gradual abolition. But, from the beginning, the masterful white race had found, in the colder North, that it was easier to do work for itself than to compel work from the black race, and, in the warmer South, that it was easier to

<sup>1</sup> See Abolition, I.

compel work from the black race than to do the work for itself. In both sections the ruling race followed naturally the line of least resistance, and negro slavery increased in the South, and decreased in the North.

The process may be seen in the number of slaves in the Colonies north and south of Mason and Dixon's line, as estimated by the royal governors in 1715, as estimated by Congress in 1775, and as ascertained by the first census, in 1790, as follows: *North*, (1715) 10,900, (1775) 46,102, (1790) 40,370; *South*, (1715) 47,950, (1775) 455,000, (1790) 657,527. Before 1790 the two sections had begun to show the contrasting results of pushing, self-interested free labor on the one hand, and shiftless, unwilling slave labor on the other.

Gouverneur Morris, in the convention of 1787, thus spoke of slavery at the time:

"It was the curse of Heaven on the States where it prevailed. Travel through the whole continent and you behold the prospect continually varying with the appearance and disappearance of slavery. The moment you leave the eastern States and enter New York, the effects of the institution become visible. Passing through the Jerseys, and entering Pennsylvania, every criterion of superior improvement witnesses the change. Proceed southwardly, and every step you take through the great regions of slaves presents a desert, increasing with the increasing proportion of these wretched beings."

Nor was the assertion denied by the Southerners who heard it. George Mason, of Virginia, said:

"Slavery discourages arts and manufactures. The poor despise labor when performed by slaves. They prevent the emigration of whites, who really enrich and strengthen a country. They produce the most pernicious effect on manners. Every master of slaves is born a petty tyrant. They

bring the judgment of Heaven on a country. As nations cannot be rewarded or punished in the next world, they must be in this. By an inevitable chain of causes and effects Providence punishes national sins by national calamities."

And Jefferson, in the same year, after detailing the evils of slavery, added: "Indeed, I tremble for my country when I reflect that God is just, and that his justice cannot sleep forever." But this substantial agreement in sentiment was very soon to be broken by an event which entirely altered the paths of the two sections.

Few influences have so colored the history of the United States and of negro slavery as the inventions of 1775-93 in England and America. In 1775 Crompton's invention of the mule jenny superseded Hargreaves's spinning machine; in 1783 Watt's steam-engine was adapted to the spinning and carding of cotton at Manchester; in 1785 cylinder printing of cottons was invented; and in 1786-8 the use of acid in bleaching was begun. All the machinery of the cotton manufacture was thus standing ready for material. Very little had thus far come from the United States, for a slave could clean but five or six pounds a day for market. In 1784 an American ship which brought eight bags of cotton to Liverpool was seized on the ground that so much of the article could not be the produce of the United States; and Jay's treaty (see that title) at first consented that no cotton should be exported from America.

In 1793, Eli Whitney, of Connecticut, then residing in Georgia, changed the history of the country by his invention of the saw-gin, by which one slave could cleanse one thousand pounds of cotton from its seeds in a day. He was robbed of his invention, which the excited planters instantly appropriated; and slavery ceased to be a passive, patriarchal institution, and became a means of gain, to be upheld and extended by its beneficiaries.

The export of cotton, which had fallen from 189,316 pounds in 1791 to 138,328 in 1792, rose to 487,600 in 1793, to 1,601,760 in 1794, to 6,276,300 in 1795, and to 38,118,041 in 1804.

Within five years after Whitney's invention cotton had displaced indigo as the great Southern staple, and the slave States had become the cotton field of the world. In 1859 the export was 1,386,468,562 pounds, valued at \$161,434,923, and the next largest export (tobacco) was valued at but \$21,074,038. Was it wonderful that Southerners should say and believe that "cotton is king," and that secession could never be attacked by blockade, since the great commercial nations, even the free States themselves, would not thus allow themselves to be deprived of the raw material of manufacture? The reader may judge the reasonableness of the belief, and the magnitude of the temptations to English intervention, by the value of the English imports of cotton from the United States and elsewhere, 1861-3, and the coincident rise in price: imports from the United States, (1861) \$132,851,995, (1862) \$6,106,385, (1863) \$2,300,000; from other countries, (1861) \$65,034,990, (1862) \$148,358,840, (1863) \$213,700,000; price per lb., (1861) 7 cents, (1862) 13½ cents, (1863) 27½ cents.

From a purely commercial and agricultural venture the cotton culture had taken a different aspect. Those who controlled it felt very much the same importance as a man might feel who had gained control of the magazine of a man of war, and could threaten to blow up the whole ship if he should be interfered with in any way.

This development of the culture of cotton was pregnant with consequences to both sections. In the North, manufactures and commerce were developed, and the remnants of slavery slid to extinction down a steeper and smoother descent. In the South, the price of slaves was steadily increasing, and the increased profit thus indicated



was steadily stamping labor itself as slavery. It is not in financial matters alone that bad money drives out good: wherever slave labor was extended, it tended constantly to expel free labor from the market. Immigration shunned slave soil as if by instinct, and it was not long before the whole population of the slave States was divided into three great classes: the rich whites, who did no work; the poor whites, who knew not how to work; and the slaves, who only worked when compelled to work.

The results on the economical development of the country may easily be imagined. No one was under any special incentive to work, to invent, or to surpass his neighbors; slaves, the only working class, could not be trusted to engage in any labor requiring care or thought; success in anything higher than the culture of cotton, tobacco, or sugar meant the inevitable freedom of the laborer; and long before 1850 "Southern shiftlessness" had become chronic, hopeless, and proverbial, even in the South. The reader who wishes for details will find them (from the census of 1850) in von Holst's third volume, or in Sumner's speech of June, 1860, as cited below; and an instructive description of affairs in 1860 is in Olmstead's two volumes.

Even on the culture of the soil the influence of the slave system was for evil. Only free labor can get large profits from a small surface, and the unwilling and unintelligent labor of slaves required so much larger area for its exercise that in 1850 there were to the square mile only 18.93 inhabitants in the Southern States to 45.8 in the Northern States.

Slavery, like Tacitus's Germans, demanded empty acres all around it. In 1860 the acreage of improved to unimproved lands in Virginia was 11,437,821 to 19,679,215; in North Carolina, 6,517,824 to 17,245,685; in South Carolina, 4,572,060 to 11,623,859; and in Georgia, 8,062,-

758 to 18,587,732. The older slave States have been selected; in the new slave States the comparison is equally or more unfavorable. In the old free State of New York the comparison stood 14,358,403 improved to 6,616,555 unimproved; in the new free State of Illinois, 13,096,374 to 7,815,615. Of the free States, all but California, Iowa, Maine, Michigan, Minnesota, Oregon, and Wisconsin had more improved than unimproved land in farms; of the slave States, only Delaware and Maryland.

The comparison of the price of lands is still more unfavorable to slavery, varying in such near neighbors as Pennsylvania and Virginia from \$25 per acre in the former to \$8 per acre in the latter. The average value of Northern farms in 1860 was \$29 an acre; of Southern farms, \$9.80.

This constant necessity for elbow room for slave labor was the ground reason for its constant effort to stretch out after new territory.

A planter's policy was to take up as much land as possible, scratch the surface until his slaves could or would extract no more from it, and then search for virgin soil; for it was cheaper to pass the Mississippi, or invade Texas, than to cultivate a worn-out farm with slave labor. Scientific agriculture, and the revivification of so-called worn-out farms, were never attempted until the overthrow of slavery; and, since they have begun, we hear no more of the need for new territory for cotton.

The influence of slavery upon the section in which it existed was particularly evil in regard to the possibilities of warfare. Not only did it throttle commerce, manufactures, literature, art, everything which goes to make a people independent of the rest of the world: its influence in checking the natural increase of fighting men is plainly perceptible in the decennial census tables. Even when there is an apparent equality of numbers between the two sections, the equality is delusive, so long as the Southern

scale is partly filled with a population not only non-combatant but actually to be distrusted as possibly hostile. For this reason, in the following table, taking separately the States which were free and slave in 1860, the population of the free States is given first, then the population of the slave States (excluding slaves), and finally the slaves.

	1790	1800	1810	1820
North.....	1,968,040	2,684,616	3,758,910	5,152,372
South.....	1,303,647	1,764,211	2,317,048	2,966,989
Slaves.....	657,527	857,105	1,163,854	1,518,930

	1830	1840	1850	1860
North.....	7,006,399	9,733,922	13,599,488	19,128,418
South.....	3,842,843	4,848,107	6,459,946	8,361,848
Slaves.....	2,005,469	2,486,326	3,204,051	3,953,524

Whatever causes may be assigned to explain the growing disproportion of free population and fighting men of the two sections, it is evident that the slave States were worse fitted at the end of each successive period for a forcible struggle with the free States, and that the sceptre was departing from the South.

It is not proposed in this article to touch on the moral aspect of slavery, or the absurd biblical arguments for and against it: the rigid application of the *partus sequitur ventrem* rule, combined with the material interests of the cotton monopoly, will absolutely distinguish negro slavery in the United States from every system that has preceded it.

We may summarize the economical evils of the system, in those points which no one can dispute, in a few words. It paralyzed invention and commerce; it prevented manu-

factures and the general introduction of railroads, steam machinery, or improved agricultural implements; it degraded labor by white as well as by black men; it stunted all the energies of the people, and deprived them of those physical comforts which were regarded elsewhere as almost necessities; it dwarfed the military ability of the people, at the same time that it increased the military ambition of the ruling class, and kept the poor whites so ignorant that to them their State was a universe, its will sovereign, and its power irresistible. Every year increased the pile of explosives in the Southern territory, and yet the force of events compelled slavery to grow more aggressive as it grew really weaker for war.

That a people so situated, with no resources of their own and with little power to draw from without, should have waged the final war as they did, is almost enough to hide in the glory of their defeat the evil thing that went down with them.

The enormous strides of the Southern States from 1870 until 1880 show what the same people can do under free labor, and nearly all Southern writers are agreed that the South was the greatest gainer by the overthrow of slavery. President Haygood, of Georgia, in a thanksgiving sermon of 1880, says:

“ For one illustration, take the home life of our people. There is ten times the comfort there was twenty years ago. Travel through your own country—and it is rather below than above the average—by any public or private road. Compare the old and the new houses. Those built recently are better in every way than those built before the war. I do not speak of an occasional mansion that in the old times lifted itself proudly among a score of cabins, but of the thousands of decent farmhouses and comely cottages that have been built in the last ten years. I know scores whose new barns are better than their old residences. Our people have better furniture. Good mattresses have largely driven out the old-time feathers.

Cook-stoves, sewing-machines, with all such comforts and conveniences, may be seen in a dozen homes to-day, where you could hardly have found them in one in 1860. Lamps, that make reading agreeable, have driven out the tallow dip, by whose glimmering no eyes could long read and continue to see. Better taste asserts itself: the new houses are painted; they have not only glass, but blinds. There is more comfort inside. There are luxuries where once there were not conveniences. Carpets are getting to be common among the middle classes. There are parlor organs, pianos, and pictures where we never saw them before. And so on, to the end of a long chapter. There are more people at work in the South to-day than were ever at work before; and they are raising not only more cotton, but more of everything else. And no wonder, for the farming of to-day is better than the farming of the old days, first, in better culture, second, in the ever-increasing tendency to break up the great plantations into small farms. Our present system is more than restoring what the old system destroyed."

II. THE SYSTEM INTERNALLY.—The Louisiana civil code (Art. 35), thus defines a slave: "One who is in the power of a master to whom he belongs. The master may sell him, dispose of his person, his industry and his labor; he can do nothing, possess nothing, nor acquire anything but what must belong to his master." This comprehensive definition will show the status of the slave and the rights of the master sufficiently to obviate the necessity of any full statement of the slave laws of the States. For these the reader is referred to the authorities cited below.

As slavery rested on custom, its regulation was uniformly by statute, the constitution usually ignoring it, and leaving it wholly in the power of the legislature. Slavery was never mentioned in the State constitutions of Delaware, Maryland (until 1837), Virginia (until 1850), North Carolina (except a mere mention of slaves in 1835,)

South Carolina (except a qualification of negroes for membership in the legislature in 1790), or Louisiana.

In the new States slavery was legalized by that provision of their constitutions which forbade the legislature to emancipate slaves without consent of their owners, or to prevent immigrants from bringing their slaves into the State: such provisions were inserted by Kentucky in 1792, Georgia in 1798, Mississippi in 1817, Alabama in 1819, Missouri in 1820, Tennessee in 1834, Arkansas in 1836, Maryland in 1837, Florida in 1838, Texas in 1836 and 1845, and Virginia in 1850; and these continued in force until the final abolition of slavery. Trial by jury for crimes above the grade of petit larceny was secured to the slave by the constitutions of Kentucky in 1799, Mississippi in 1817, Alabama in 1819, Missouri in 1820, and Texas in 1845, and by various statutes in Georgia, Tennessee, North Carolina, and Maryland, but was denied in any case in South Carolina, Virginia, and Louisiana.

There were also provisions in most of the States for the punishment of the wilful and deliberate murder of a slave. The benefit of both these provisions, however, was largely nullified by the universal rules of law that a negro's testimony could not be received against a white man, and that the killing of a slave who should resist "lawful authority" was justifiable homicide. As slavery grew more extensive the necessity for repressive legislation to act upon the slaves became more pressing, and the slave codes more severe, until every white person felt himself to be a part of a military force guarding a dangerous array of prisoners. Education of slaves was strictly forbidden, though this provision was frequently evaded or disobeyed in individual cases. The pass system was in full vigor everywhere, and even the younger girls of the master race did not hesitate to stop a strange negro on the road, examine his pass, or order him to a particular house for examination. It was a strange society,

always on the alert, always with its hand on the sword, and cruel and evil things were done in it. The burning of negroes as a punishment for heinous offences was not an uncommon thing, nor was it by any means the most shocking of the crimes in the punishment of which George Mason's prophetic words of 1787 were rigidly fulfilled.

Many of the evils had a reflex influence upon the men of the dominant race; but the women, shielded from personal contact with most of the evil, and trained from childhood in the daily exercise of the heroic virtues, developed an unusual force of character, to which much of the stubborn endurance of the war was due, and even more of the sudden rejuvenation of the South after the war.

*Black Codes, or Black Laws.*—These penal laws of the slave States had a very direct influence upon the legislation of several of the free States, particularly of those to which there had been a large Southern migration. Ohio, in 1803, forbade negroes to settle in the State without recording a certificate of their freedom; in 1807 passed an act denying to negroes the privilege of testifying in cases in which a white man was interested on either side; and followed this up by excluding them from the public schools, and requiring them to give bonds for their good behavior while residing in the State. In 1849 these "black laws" were repealed as a part of the bargain between the Democrats and Free-Soilers.

The legislation of Illinois in 1819, 1827, and 1853 imitated that of Ohio, and in 1851 Indiana inserted similar provisions in her State constitution, which the State courts, in 1866, held to be void, as repugnant to the Constitution of the United States. The same provisions were adopted by Iowa in 1851 by statute, and were made a part of the State constitution of Oregon in 1857. Wherever the State constitutions prescribed conditions

of admission to the militia, as in Indiana in 1816, Illinois in 1818, Iowa in 1846, Michigan in 1850, Ohio in 1851, and Kansas in 1859, negroes were excluded; and in the States where the composition of the militia was left to the legislature the exclusion was as fully attained by statute. As a general rule, most of this legislation was swept away as rapidly as the Republican party obtained complete control of each State, after 1856.

*Insurrections.*—No slave race has organized so few insurrections as the negro race in the United States. This can hardly be due to the natural cowardice of the race, for its members have made very good soldiers when well organized; nor to the exceptional gentleness of the system, for it was one of increasing severity; nor wholly to the affection of the negroes for their masters, for the great plantation system, under which there could be little affection on either side, had been fairly established in 1860, and yet there was no insurrection throughout the Rebellion.

It is encouraging to believe that the race, by long contact with the white race, has imbibed something of that respect for law which has always characterized the latter, so that the negroes, however enterprising when backed by the forms of law, patiently submitted to legal servitude. It is certain that revolt, during their history as slaves, was regularly individual, and that most of it was only revolt by legal construction.

In 1710 a negro insurrection is said to have been planned in Virginia, but it was balked by one of the conspirators, who revealed the plot, and was rewarded by emancipation. In 1740, a local insurrection broke out in South Carolina, but it was stamped out instantly by the militia. In New York a negro plot was unearthed in February and March, 1741, and as a consequence of the intense popular excitement a number of negroes and whites were hung, and several negroes burned; but the



whole story of the "conspiracy" seems now of the flimsiest possible construction. In 1820 Denmark Vesey, a St. Domingo mulatto, organized a negro insurrection in Charleston. It was revealed, Vesey and thirty-four others were hung, and a like number were sold out of the State. In August, 1831, the most formidable of all the insurrections broke out in Southampton County, near Norfolk, Virginia, led by Nat Turner. He believed that he had been instructed by Heaven, three years before, to rebel, the sign being an eclipse of the sun in February, 1831; but, oppressed by a sense of the greatness of the task, he fell sick, and did not begin until August. With fifty associates he then began a massacre of the whites, sparing neither age nor sex. The insurrection was at once suppressed, and Turner, after several weeks' concealment, was captured and executed in November. The total loss of life was sixty-one whites and over a hundred negroes.

The Seminole war in Florida partook very much of the character of a negro insurrection. While Florida was under Spanish rule, very many fugitive slaves had taken refuge there and intermarried with the Indians; and the desire of reclaiming them was the secret of many of the Indian difficulties of that region. In 1816 American troops blew up the "negro fort" on the Appalachiola, which was the headquarters of the fugitives.

On the annexation of Florida, slave hunting increased in eagerness, and the fugitives were pursued into the everglades. In 1833 the Seminoles had about two hundred slaves of their own and twelve hundred fugitives. One of the latter, the wife of Osceola, was seized while trading at Fort King, and her enraged husband at once began open war. It was conducted with inhuman cruelty on both sides, the most prominent example being the massacre of Major Dade's command, December 28, 1835. The American commanders hardly ever made any secret

of the great object of the war, the recapture of the fugitives; and, as the Seminoles refused to make any treaty in which the fugitives were not included, the war was long and expensive.

In 1845 a treaty was arranged for the removal of both Seminoles and fugitives beyond the Mississippi, but the claimants pursued the latter with every form of legal attack, secured some of them, and, in 1852, obtained payment from Congress for the remainder. The Harper's Ferry insurrection closed the list of negro revolts.

### III. THE SYSTEM EXTERNALLY; THE SLAVE TRADE.

—1. *Foreign Slave Trade.*—It has long been a general belief that the Colonies, before the Revolution, were anxious to prohibit the slave trade, but were prevented by the crown's instructions to the governors to veto any such laws; and the Virginia declaration of June 29, 1776, denounces the King for "prompting our negroes to rise in arms among us, those very negroes whom, by an inhuman use of his negative, he had refused us permission to exclude by law."

The case is complete enough against the crown. From the time of Hawkins's slaving cruise in 1562 the British government was an active partner in the slave trade. By the treaty of Utrecht, in 1713, it secured for one of its monopolies the slave trade from Africa to the West Indies; in 1750 it beneficently threw open the trade to all its subjects; and its consistent policy is well stated in the official declaration of the Earl of Dartmouth in 1775, that "the Colonies must not be allowed to check or discourage in any degree a traffic so beneficial to the nation."

But it is not so easy to clear the skirts of the Colonies. The assertion of their desire to suppress the trade rests on the passage of a great number of acts laying duties upon it: the titles of twenty-four of these acts in Virginia are given in Judge Tucker's Appendix to Blackstone. But almost invariably these acts were passed for

revenue only, and the Virginia act of 1752 notices in its preamble that the duty had been found "no ways burdensome to the traders."

It was not until the opening of the Revolution that any honest effort was made to suppress the trade, except in Pennsylvania, where bills to abolish the slave trade were passed in 1712, 1714, and 1717, and vetoed. The Massachusetts General Court passed a bill to prohibit the slave trade, March 7, 1774, and another, June 16th following; but both were vetoed. It was prohibited further by Rhode Island in June, 1774; by Connecticut in October, 1774; and by the non-importation covenant of the Continental Congress, October 24, 1774, as follows:

"We will neither import nor purchase any slave imported after the first day of December next, after which time we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it."

This covenant, ratified by the States, North and South, checked the trade for the time. No further attempt was made by Congress to interfere with the trade, and the ratification of the Articles of Confederation in 1781 gave the States the power to regulate this and all other species of commerce.

In the formation of the Constitution the question of the regulation of the slave trade offered a great difficulty. The three Southern States demanded its continuance, alleging that Virginia and Maryland desired to prohibit it only to secure a domestic market for their own surplus slaves. The matter was compromised by allowing Congress to prohibit it after 1808.

In the meantime the act of March 22, 1794, prohibited the carrying of slaves by American citizens from one foreign country to another; the act of May 10, 1800, allowed United States war vessels to seize ships engaged

in such trade; and the act of February 28, 1803, prohibited the introduction of slaves into States which had forbidden the slave trade by law. Virginia had done so by statute in 1778 and 1785, Georgia by constitutional provision in 1798, South Carolina by statute in 1787 (repealed in 1803), and North Carolina by statute in 1798. Finally, Congress, by act of March 2, 1807, prohibited the importation of slaves altogether after the close of the year; the acts of April 20, 1818, and March 3, 1819, authorized the President to send cruisers to the coast of Africa to stop the trade; and the act of May 15, 1820, declared the foreign slave trade to be piracy. It cannot, however, be truly said that the slave trade was abolished: it never really ceased before 1865.

The census of 1870 assigns Africa as the birthplace of nearly two thousand negroes, and it is impossible even to estimate the number illegally imported from 1808 until 1865. The sixth section of the act of March 2, 1807, allowed negroes confiscated under the act to be disposed of as the legislature of the State might direct; and Southern legislatures promptly directed the sale of the confiscated negroes. This absurd section, which introduced slaves into the South, while punishing the importer, was repealed March 3, 1819, and the confiscated negroes were ordered to be returned to Africa.

The claim of British naval officers on the African coast to visit and search vessels flying the American flag, but suspected of being slavers, was steadily resisted by the American Government, and led to an infinite variety of diplomatic difficulties and correspondence, which the reader will find detailed in William Beach Lawrence's volume, cited below. It was finally compromised by articles eight and nine of the Webster-Ashburton treaty, August 9, 1842, by which the two governments agreed to maintain independent squadrons on the African coast, to act in conjunction.

Difficult as this made the slave trade, it by no means suppressed it; and, as the price of negroes in the South rose higher, importations increased, and so did the difficulties of obtaining convictions from Southern juries.

The most notorious case was that of the Georgia yacht *Wanderer*, in December, 1858, but it was not the only one.

According to the *Evening Post* of New York City, eighty-five vessels were fitted out from that port for the slave trade during eighteen months of 1859-60, the names of the vessels being given; and another newspaper of the same city estimated the cargoes introduced by these New York vessels alone at from thirty thousand to sixty thousand negroes annually. Said a Georgia delegate in the Charleston convention of 1860: "If any of you Northern Democrats will go home with me to my plantation I will show you some darkies that I bought in Virginia, some in Delaware, some in Florida, and I will also show you the pure African, the noblest Roman of them all. I represent the African slave trade interest of my section."

In 1858 an ingenious attempt was made to evade the law. A Charleston vessel applied for a clearance to the African coast "for the purpose of taking on board African emigrants, in accordance with the United States passenger laws." Howell Cobb, Secretary of the Treasury, refused to give the clearance.

As we approach the year 1860 we find growing apprehensions of the reopening of the foreign slave trade. It must be remembered that Congress was only permitted, not directed, to abolish the trade after 1808, and that a simple repeal of the law of 1807 would have made it as legal as any other branch of commerce.

The inherent weakness of the system of slavery, which grew weaker as it widened, imperatively demanded the repeal. To retain political power it was necessary to introduce the custom of slavery into the new Territories in

order to prepare them to be slave States. For this the domestic supply would not suffice; and Alex. H. Stephens, in his farewell speech to his constituents, July 2, 1859, says that his object is "to bring clearly to your mind the great truth that without an increase of African slaves from abroad, you may not expect or look for many more slave States."

The repeal of the law of 1807, and the revival of the foreign slave trade, were advocated by the Southern commercial convention in 1858 and 1859, by De Bow's *Review*, and by a great and growing number of leading men and newspapers. It was even taking the aspect of a new phase of a distinct Southern political creed, an effort to repeal that which was a standing condemnation of slaveholding and slaveholders.

Before anything definite could be attempted, secession intervened. The constitution of the Confederate States forbade the foreign slave trade, and "required" Congress to pass such laws as should effectually prevent the same. How long this prohibition would have endured, if independence had been achieved, cannot be conjectured, but it is certain that a slaveholding government would have found far more difficulty in enforcing such a prohibition than the Government of the United States had found.

2. *The Domestic Slave Trade*.—Even barring secession and rebellion, negro slavery had always a possible danger in the undoubted power of Congress to regulate commerce "between the States." Should this power ever find a majority in Congress ready to apply it in an unfriendly spirit to the sale of slaves from State to State, and thus to coop up each body of slaves in its own territory, the system would be injured in a vital point. For this reason the ninth section of the act of 1807 allowed the transfer of slaves from point to point along the coast in vessels of not more than forty tons burden.

After the abolition of slavery in the British Colonies,

American coasting vessels with slaves on board would occasionally be forced by stress of weather into British West India ports, when the authorities at once liberated the slaves. Diplomatic complications followed, of course; but the British Government steadily refused to pay for the slaves liberated, except in cases which had occurred before the abolition of slavery in the West India Colonies.<sup>1</sup>

The domestic slave trade by land was never interfered with until the abolition of slavery, except by the unavoidable operations of war during the Rebellion. A bill was introduced by Sumner in 1864 to prohibit it, but it came to nothing. A bill to repeal the sections of the act of 1807 permitting the coastwise slave trade was added as a rider to an appropriation bill, and became law July 2, 1864.

IV. THE SUFFRAGE CLAUSE AND THE "SLAVE POWER." — The Constitution gave to the States in which slavery existed legal representation in the Lower House of Congress for three fifths of their slaves. In this provision there was innate an influence which was as potent on the political aspect of the slave system as the cotton culture was upon its material aspect.

It must be remembered, that, in spite of the number of slaves in the South, slave *owning* was not at all general in that section. In 1850 the white population of the South was 6,459,946, and De Bow, superintendent of the census, and a pro-slavery Southerner, gives the number of slaveholders as only 347,525, classified as follows: holders of one slave, 68,820; 2 to 5 slaves, 105,683; 6 to 10 slaves, 80,765; 11 to 20 slaves, 54,595; 21 to 50 slaves, 29,733; 51 to 100 slaves, 6,196; 101 to 200 slaves, 1,479; 201 to 300 slaves, 187; 301 to 500 slaves, 56; 501 to 1000 slaves, 9; over 1000 slaves, 2. But even this statement, De Bow admits, has an element of deceptiveness, for most of the small holders were not slave owners, but slave

<sup>1</sup> See Creole Case, and the authorities there cited for the other cases.

hirers; and he estimates the actual number of slave owners at 186,551. In 1850, ninety of the 234 members of the House of Representatives were apportioned to the slaveholding States. If we omit from their population three fifths of the number of their slaves in 1850, they would have been entitled in round numbers to but seventy representatives. The other twenty members represented only the 186,551 slave owners, and the loosest examination of the majorities by which bills passed the House of representatives during the anti-slavery conflict will show that the introduction of these twenty votes was usually the decisive factor down to 1855. This consequence was apparent from an early date. The repeal of the suffrage clause was demanded in 1814,<sup>1</sup> and the demand grew still stronger after 1833, and never failed to excite the hottest wrath of Southern members.

Perhaps the occasion which roused the most intense feeling was the presentation by John Quincy Adams in Congress, December 21, 1843, of a formal proposal from the Democratic Legislature of Massachusetts to amend the Constitution by repealing the three-fifths clause. In Congress it was denounced unsparingly, and refused the privilege of printing, and out of Congress the fervor of denunciation was unreportable.

But the direct operation of the three-fifths clause was far less than its indirect influence. It must be remembered that the 200,000 slave owners necessarily included in their ranks almost all the governors, judges, legislators, and leading men of the slave States, and their senators and representatives also, since the purchase of one or more slaves was the first step of any man who began to acquire wealth; and that all these men were united by a common purpose, the protection of property, which was superior in its every-day operation to almost any other claim. Practically, then, the 200,000 slave owners,

<sup>1</sup> See Hartford Convention.



recruited from time to time by new accessions, formed a dominant class; and the ninety representatives and thirty senators (in 1850) not only represented them, but were selected from their number.

Such a political force as this had never before appeared in American politics: the utmost conceivable evils of the influence of corporations must pale their fires before it; and it is no wonder that, as it rose gloomier and more threatening upon the Southern sky, the instinctive political sense of the people gave it the name of the "slave power." In the nature of things this power could not be conservative: it must be aggressive, for the interest represented by it demanded extension to obtain profit; and yet, as it grew wider, it grew weaker, and needed still warmer support. The general, double-acting rule was: the more slaves, the more territory; the more territory, the more slaves. It was not in human nature for the men who made up the slave power to resist an influence so constant, so natural, so silent, and so powerful, and the vicious twist given by it to the whole Southern policy grew stronger yearly. No influence, even that of honor, could resist its undermining or escape being argued away. It was progressively successful in transplanting the custom of slavery beyond the Mississippi, in swinging the whole force of the nation upon Mexico for the acquisition of new slave territory, and in violating the condition precedent on which it had obtained the admission of Missouri as a slave State; and it was partially prepared in 1861 to shock the conscience of civilization by reopening the foreign slave trade, to whose suppression the good faith of the nation was pledged. But before this last effort could be made, its time had come.

The internal defects of the combined cotton-slave system could not remain stationary. Nothing is more certain than that, from 1850 to 1860, the number of slave owners was diminishing, particularly in the Gulf States,

the plantations were growing larger, the cotton culture was becoming less and less patriarchal and more and more of a business, and the slave power itself was growing more compact, grasping, and reckless. It might have been that, without secession, this concentrating process would have gone on until the non-slaveholding whites of the South would have united against it; but that possibility was never tried. In 1860 the rising anti-slavery tide of the North and West came into flat collision with the rising tide of the slave power, and equilibrium was at last restored by violence.

It was not alone the inherent grasping nature of the slave power which affronted the non-slaveholding States and helped to bring about the final catastrophe. It is no reflection upon Southern legislators of the present to say that the slaveholding member of Congress until 1861 was in general an exceedingly unpleasant personage. His faults of thought, feeling, expression, and manner were long ago explained by Jefferson:

“ If a parent had no other motive, either in his own philanthropy or in his self-love, for restraining the intemperance of passion toward his slave, it should always be a sufficient one that his child is present. But generally it is not sufficient. The parent storms, the child looks on, catches the lineaments of wrath, puts on the same airs in the circle of smaller slaves, gives a loose rein to his worst passions, and thus nursed, educated and daily exercised in tyranny, cannot but be stamped by it with odious peculiarities.”

However unjust it may be in theory to wage a political crusade against bad manners, it is as certain as anything can be that the political union of the free States in 1860 was largely brought about by the “odious peculiarities” of slaveholding members of Congress in debate. Their boisterous violence, their willingness to take liberties of language, contrasted with their unwillingness to allow

the same liberty to opponents, their disposition to supplement discussion with actual violence or threats of it, the indescribable and merciless assumption of an acknowledged superiority, made the debates of 1850-60 a shameful record, and are still remembered by their old opponents, with a certain soreness, as "plantation manners." It was bad enough that a Senator should be clubbed into unconsciousness for words spoken in debate; it was, if anything, worse that his first speech on his return to the Senate should be answered by a South Carolina Senator with the remark that "we are not inclined again to send forth the recipient of punishment howling through the world, yelping fresh cries of slander and malice."

Southern writers will never fully understand the election of 1860 until they come to study, in the light of the new training, the debates which preceded it.

A power so situated, in a constantly weakening minority in the nation, and yet supreme in influence in its own States, was necessarily particularist in theory. Where it ruled, the forefathers had said State sovereignty and meant State rights, while their descendants said State rights and meant State sovereignty (see that title). And the development of the great cotton interest made State sovereignty even worse than it was by nature: instead of the jarring and comparatively innocuous demands of State sovereignty, it banded together a number of States by a common controlling interest, and evoked the deadly peril of sectional sovereignty.<sup>1</sup>

State rights could never have caused a blow; even State sovereignty would have died a harmless and natural death; but slavery and sectional State sovereignty each so acted and reacted upon the evil points of the other that the combined tumor was at last beyond reach of anything but the knife. But, during its existence, slavery never hesitated upon occasion to drop State sovereignty

<sup>1</sup> See Nullification, Secession.

for the time, and use the nation and the national idea as political forces for its advancement; and yet it never did so, except in the case of the acquisition of Florida, without injuring itself.

In its infancy it acquired the territory west of the Mississippi by a process which was only defensible on the ground that the powers of the Government were given by a nation, and not by sovereign States; and out of this territory grew its subsequent difficulties. It flung the nation upon Mexico, and the disputes over the territory thus acquired first put the anti-slavery sentiment into political shape. It forced the passage of a fugitive slave act fatally adverse to State sovereignty and State rights in compensation for the admission of California as a State, an act whose operation made its moving power the object not only of dread but of abhorrence in the free States. Finally, by transferring theoretical State sovereignty into practical secession, it compelled such an extensive showing of national power that the effects will be felt for generations to come.

V. SLAVERY IN TERRITORIES AND NEW STATES.—It is certain that slavery in the original States was founded on custom only, and the same foundation, if any, must be found for slavery in Territories and new States. The modern States of Kentucky and Tennessee, for example, were never colonies or territories of their parent States: they were integral parts of Virginia and North Carolina, and the custom of slavery was established at Nashville or Harrodsburgh on just the same basis as at Beaufort or Richmond. When their separation from the parent States took place, the custom of slavery remained, and they entered the Union as slave States.

Granting that no opposition to slavery was felt by the nation at large, the same process might have been repeated anywhere, and custom, unopposed, might have made any territory slave soil, and brought it into the

Union as a slave State. It is, therefore, impossible to admit fully the dogma, so popular and useful in the anti-slavery conflict, that the national territory was free soil without any statutory enactment. It might be free, and it might be slave, according to custom. In the cases of Kentucky, Tennessee, Mississippi, and Alabama, the cessions of their territory were accepted by the United States from Virginia, North Carolina, South Carolina, and Georgia, under a pledge not to interfere with the existing custom of slavery. The rights of all these States to the territory which they professed to cede, like the rights of New York, Connecticut, and Massachusetts to the northwestern territory, were exceedingly doubtful; nevertheless, the pledge was honorably fulfilled.

The slaveholding States always denied that any act of Congress could prohibit the custom of slavery in a Territory. But this is as impossible of acceptance as the free-soil dogma above stated. The Territories were certainly not without law. Their inhabitants were not the law-making power, for then there would have been no distinction between Territories and States. On any other subject than slavery, no one, in court or Congress, denied that Congress was the law-maker for the Territories. But slavery was only a custom; and, while no one denies that a custom is valid until abrogated by statute, this has been the only case in which it has been seriously asserted that any custom is above and beyond abrogation by statute.

So evident was this in 1787 that the ordinance of that year<sup>1</sup> abolished slavery in the territory northwest of the Ohio, in whose case no restraining pledge had been given. The Articles of Confederation, which were then in force, gave Congress no power to so prohibit slavery, or, indeed, to hold or govern territory at all.

The whole act was so obviously a consequence of the

<sup>1</sup> See Ordinance of 1787.

national power to hold and govern its own territory, and was so plain a parallel to the proposal to similarly prohibit slavery in the Mexican annexations,<sup>1</sup> that Southern writers have endeavored to avoid it in two ways: 1. They assert that the ordinance was merely an expression of the will of the several States, a new article of confederation, so to speak. This is impossible. The State vote on the Ordinance of 1787 was indeed unanimous, but this fact has no bearing on the matter, for the Ordinance of 1784, which covered much the same ground (excepting the prohibition of slavery), was not adopted by unanimous vote, South Carolina voting in the negative, and yet its validity was never impeached on that account. Further, the Articles of Confederation were to be amended by State legislatures only: however we may admit the power of a national convention to override them, we can hardly acknowledge the power of Congress itself to amend them. 2. Judge Taney, in the Dred Scott decision, holds that the Ordinance of 1787 "had become inoperative and a nullity upon the adoption of the Constitution." If this was so, and if it was true, as the same decision holds, that the power of Congress to "make all needful rules and regulations" for the territory of the United States was intended to be confined to the territory then owned by the United States, and not to be extended to territory subsequently acquired, the fugitive slave law of 1850 was in a large degree unconstitutional. It was based on the fugitive slave clause of the Constitution: but this only allowed the reclamation of slaves from one *State* to another *State*.<sup>2</sup>

During the territorial existence of the Northwest the ground was covered by this proviso to the prohibition of slavery by the Ordinance of 1787: "provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original

<sup>1</sup> See Wilmot Proviso.

<sup>2</sup> See Fugitive Slave Laws.

States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid." If the power to make "rules and regulations" for the Territories only applied to the territory owned in 1789, and was intended to supply the place of the fugitive slave clause in the superseded Ordinance of 1787, it follows that the fugitive slave law of 1793 exhausted the constitutional powers of Congress to provide for the reclamation of fugitive slaves from a Territory.

All the trans-Mississippi territory was subsequently acquired; and, if the Dred Scott decision was correct, the fugitive slave law of 1850 was unconstitutional in providing for the reclamation of fugitive slaves from it. The consequence must have been that the trans-Mississippi Territories, whether slavery were allowed or prohibited in them, would have been a sort of Alsatia, a safe refuge for fugitive slaves; and slavery would have been at a greater disadvantage than under the Ordinance of 1787.

The custom of slavery was already in existence in Louisiana and Florida at the time of their annexation, but the responsibility for its enlargement is directly upon Congress. The act of March 26th, 1804, provided that no slaves should be introduced into the territory, *except* "by a citizen of the United States, removing into said territory for actual settlement, and being at the time of such removal *bona fide* owner of such slave or slaves"; and the act of March 30, 1822, while forbidding the importation of slaves from without the United States, by implication allowed the domestic slave trade.

Both acts confirmed the laws then in force in the Territories, and not inconsistent with the acts; and as the territorial laws recognized slavery, it continued in force, and Louisiana and Florida entered the Union as slave States. Upon the admission of Louisiana as a State, the continuance of the custom of slavery in the rest of the purchase was practically provided for by the sixteenth

section of the act of June 4, 1812, continuing the territorial laws of Louisiana in the new Territory of Missouri. Again, when the new Territory of "Arkansaw" was created by the act of March 2, 1819, a similar provision continued in the new Territory the laws of Missouri, which recognized slavery.

The consequences of this long *laches*, this omission of Congress to prohibit the custom of slavery, which had been recognized by French, Spanish, and territorial law, had now become apparent in the application of Missouri for admission as a slave State, and the tardy attempt in Congress to attack the evil raised a political storm. On the one hand, since the new State had not the ability to compel a recognition of its existence, its recognition was clearly a matter of favor, on which Congress could impose such conditions as it should consider needful. On the other, it was hardly just that Congress should permit the existence of even an evil custom during its own responsibility for government, and only undertake to abolish it at the instant of giving the State professed self-government.

The settlement of the case is elsewhere given<sup>1</sup>; it resulted in the abolition of slavery in the rest of the Louisiana purchase, above 36° 30' north latitude, and the admission of Missouri as a slave State. As there was no abolition of the custom of slavery in the Territory of Arkansas, we must consider the custom left still in existence there. On the application of Arkansas for admission as a slave State in 1836, there were some symptoms of a renewal of the Missouri struggle; but John Quincy Adams and other anti-slavery men agreed that the admission of Arkansas was fairly nominated in the Missouri bond, and the State was admitted. At the same session an increase in the area of Missouri made a considerable addition to the slave soil of the United States.

<sup>1</sup> See Compromises.



Here the extension of slavery stopped, with the exception of the admission of Florida and Texas as slave States in 1845. The area of Texas had been free soil under the decree of Guerrero, the Mexican dictator, in 1829, afterward ratified by the Mexican Congress; and slavery is not recognized in the constitution of the Mexican state of Coahuila and Texas, or in the provisional Texas constitutions of 1833 and 1835. But American settlers had brought their slaves with them, and fairly introduced the custom of slavery; and the constitution of 1836 formally declared all persons of color slaves for life, if they had been in that condition before their emigration to Texas, and were then held in bondage. This, though the State was not in the Union as yet, was the only instance of the professed establishment of slavery by the organic law of an American State, unless we are to take the Massachusetts code of 1641 as the first.

The basis of the system is clearly expressed in a section of the Kentucky constitution of 1850, as follows: "The right of property is before and higher than any constitutional sanction; and the right of the owner of a slave to such slave and its increase is the same and as inviolable as the right of the owner of any property whatever." It was no more necessary, then, to declare a constitutional right of property in the case of slaves than in the case of horses: in both cases the legislature was to accept and defend the right without question. A slave State was regularly declared such, at its admission, only by the provision forbidding the legislature to emancipate slaves without consent of owners, or to forbid the domestic slave trade.

As slavery reached the limits of its State extension in 1845, it only remains necessary to recur to its attacks upon the Territories. Here the customary basis of slavery makes manifest the weakness of the claims for its extension after 1845. It is one thing to acknowledge the

validity of a recognized and unopposed territorial custom in Louisiana, Missouri, and Arkansas: it is a very different thing to admit, as pro-slavery advocates required, that the custom could not be abolished by statute, or prohibited where it did not exist. Nevertheless, in this respect, the compromise of 1850 gave the slave States all they then asked. It refrained from prohibiting the custom, and gave the territorial legislature a general right of legislation, subject, of course, to the veto power of Congress. But this last was now a meaningless form: it was impossible to obtain the passage of an act by Congress and the President, annulling a territorial law recognizing slavery.

Congress practically gave loose reins to the territorial legislatures, and they took advantage of it. New Mexico (then including Arizona) passed an act in 1851 recognizing peonage, or white slavery, and another in 1859 recognizing negro slavery; and Utah (then including Nevada) passed an act in 1852 maintaining the right of slaveholding immigrants to the services of their slaves. None of these acts was annulled until 1862.<sup>1</sup>

The Kansas-Nebraska bill (see that title) in 1854 went a step further. It took off the Missouri prohibition of 1820, and allowed the introduction of the custom into all the Territories. It is at least doubtful, leaving out the good faith of the repeal, whether a custom could properly be introduced in that way; but the climax of doubtfulness was reached when the Kansas struggle showed that the custom had no chance of practical introduction in that Territory. The pro-slavery claim<sup>2</sup> was then advanced that both Congress and the territorial legislatures were bound to defend slavery in the Territories. If negro slavery was based on custom, and not on organic law, this claim was certainly a novelty in jurisprudence.

<sup>1</sup> See Wilmot Proviso.

<sup>2</sup> See Dred Scott Case; Democratic Party, Compromises.

We can easily understand the recognition or the prohibition of a custom by statute, but the establishment of a custom by statute is beyond conception. Yet this is the sum of the Southern demand, when divested of verbiage and reduced to its real essence; and secession was based on the refusal of the demand.

For the political influence of slavery, see Democratic Party, Whig Party, American Party, Republican Party. For the extinction of the system, see Abolition, Emancipation Proclamation. See, in general, Williams's *History of the Negro Race*; Wilson's *Slave Power in America*; Hildreth's *United States*; von Holst's *United States*; Kapp's *Geschichte der Sklaverei*; 1 Draper's *History of the Civil War*; Jay's *Miscellaneous Writings on Slavery*; Cobb's *Historical Sketch of Slavery*; Goodell's *Slavery and Anti-Slavery*; Nott's *Slavery and the Remedy*; Weston's *Progress of Slavery*; and, on behalf of slavery, *The Pro-Slavery Argument*, including Hammond's *Letters on Slavery*, and Dew's *Review of the Virginia Debate of 1832*; Adams's *South Side View of Slavery*; Fitzhugh's *Sociology for the South*; and Sawyer's *Southern Institutions*.—(I.) 3 Bancroft's *United States*, 415; Hildreth's *Despotism in America*; Hurd's *Law of Freedom and Bondage*; H. Sherman's *Slavery in the United States*; Stroud's *Laws of Slavery*; Goodell's *American Slave Code*; Poore's *Federal and State Constitutions*; authorities under the States named, particularly Moore's *Slavery in Massachusetts*; Ambler's (*Chancery*) *Reports*, 76; 11 *State Trials*, 340, and Lofft's (*K. B.*) *Reports*, 1 (Somerset case); Livermore's *Historical Research on Negroes*; 5 Elliot's *Debates*, 392; Jefferson's *Notes on Virginia* (edit. 1800), 164; 1 Bishop's *History of American Manufactures*, 355, 397; Pitkin's *Statistical View of American Commerce*, 110; *Cotton is King* (1855); Kettell's *Southern Wealth and Northern Profits*; Turner's *History of Cotton and the Cotton Gin* (1857); Donnell's *History of Cotton*

(1872); 3 von Holst's *United States*, 563; 5 Sumner's *Works*, 1, or Lester's *Life of Sumner*, 311; Helper's *Impending Crisis*; Olmstead's *Cotton Kingdom*; *Census Reports*, 1850-70; King's *The Great South* (1875); Haygood's *The New South* (1880).—(II.) The general authorities; the first seven authorities under preceding section; Horsmanden's *New York Negro Plot of 1741*; *Atlantic Monthly*, June, 1861 (Vesey), August, 1861 (Turner); Giddings's *Exiles of Florida*.—(III.) Clarkson's *History of the Slave Trade*, 52; Copley's *History of Slavery*, 113; Andrews's *Slavery and the Domestic Slave Trade*; Carey's *The Slave Trade, Domestic and Foreign*; 1 Draper's *History of the Civil War*, 418; Foote's *Africa and the American Flag*; *Continental Monthly*, January, 1862 (Slave Trade in New York); 2 Tucker's *Blackstone*, Appendix, 49; 1 *Journals of Congress*, 24; 1 *Stat. at Large*, 347 (act of March 22, 1794); 2 *Stat. at Large*, 70, 205, 426 (acts of May 10, 1800, Feb. 28, 1803, and March 2, 1807); Quincy's *Life of Quincy*, 102; 3 *Stat. at Large*, 450, 533, 600 (acts of April 20, 1818, March 3, 1819, and May 15, 1820); W. B. Lawrence's *Visitation and Search*; Cleveland's *A. H. Stephens in Public and Private*, 647; Sprout's *Foreign Slave Trade*.—(IV.) The general authorities; Cairnes's *The Slave Power*; 2 Olmstead's *Cotton Kingdom*, 192; *Census Report*, 1850.—(V.) 1 *Stat. at Large*, 106, and 2 *ib.*, 70, 235 (cessions by North Carolina and Georgia); 4 *Journals of Congress*, 380 (ordinance of 1784); authorities under Ordinance of 1787; Fisher's *Law of the Territories*; 2 Benton's *Debates of Congress*, 221, and 16 *ib.* (index under Slavery); Burgess's *Middle Period*; W. H. Smith's *Political History of Slavery*; Hay and Nicolay's *Life of Lincoln*; Pearson's *Life of Andrew*; Francis Curtis's *History of the Republican Party*; for the acts in regard to the States and Territories, see authorities under their names.

## CHAPTER II

### THE ABOLITION AGITATION

I. GRADUAL ABOLITION (1776–1830).—At the beginning of our national history abolition was a desire rather than a purpose, a matter of sentiment rather than of endeavor. In this sense every humane and thinking man, North or South, was an Abolitionist. It would be waste of space to quote the words of Washington, Jefferson, Madison, Henry, Mason, Laurens, and other Southerners, in order to show the drift of feeling in the South on this subject. All concurred in deploring the existence of slavery in their section, and in hoping that in some way not yet imagined its gradual and peaceful abolition would finally be accomplished.

In the North the feeling was the same, except that the Quakers, or Society of Friends, had, since 1760, taken higher ground, and had made slaveholding and slave-trading matter for church discipline. In 1777 Vermont, not yet admitted to the Union, formed a State constitution abolishing slavery. State constitutions were formed by Massachusetts, including Maine, in 1780, and by New Hampshire in 1783, which the courts at once construed as abolishing slavery. Gradual abolition was secured by statute in Pennsylvania in 1780, in Rhode Island and Connecticut in 1784, in New York in 1799, and in New Jersey in 1804.

Abolition of slavery in the Northwest Territory, north of the Ohio and east of the Mississippi, including the

present States of Ohio, Illinois, Indiana, Michigan, Wisconsin, and part of Minnesota, was secured by the Ordinance of 1787. Here the process of abolition ceased for a long time, except that in 1817 New York totally abolished slavery after July 4, 1827, and that slavery in part of the Louisiana purchase, including the present States of Iowa, Oregon, Kansas, Nebraska, a part of Colorado, and part of Minnesota, was abolished by the Missouri Compromise,<sup>1</sup> whose validity was rejected by the Supreme Court<sup>2</sup>; but the provision for abolition was embedded in the State constitutions of the States named as they were severally admitted.

In process of time gradual abolition took effect in the States which had adopted it by statute, but so slowly that there were, in 1840, 674 slaves in New Jersey, 331 in Illinois, 64 in Pennsylvania, and from 1 to 17 in Connecticut, Indiana, Iowa, New Hampshire, New York, Ohio, Rhode Island, and Wisconsin, respectively. In 1850 slavery had disappeared in all these States except New Jersey, which still had 236 slaves in 1850 and 18 in 1860, the latter number being "apprentices for life," under the State act of April 18, 1846. In 1831-32 the insurrection of Nat Turner excited a strong desire for gradual abolition in Virginia, which was with great difficulty smothered after a three weeks' debate in the Legislature.

*Abolition Societies*, based on the idea of gradual abolition, were formed in Pennsylvania in 1774, in New York in 1785, in Rhode Island in 1786, in Maryland in 1789, in Connecticut in 1790, in Virginia in 1791, and in New Jersey in 1792. These societies held annual conventions, and their operations were viewed by the more humane slaveholders with some favor, since they aimed at nothing practical or troublesome, except petitions to Congress, and served as a moral palliative to the continuance of the

<sup>1</sup> See Compromises.

<sup>2</sup> See Dred Scott Case.

practice. The abolition of the African slave-trade by Great Britain in 1807, and by the United States in 1808, came as a great relief to the abolition societies, which had grown discouraged by the evident impossibility of effecting anything in the South, and were now ready to accept this success as the limit of possibility for the present. Their annual national meetings became more infrequent and soon ceased altogether, though some State branches remained alive.

*Colonization Society.*—In 1801, Jefferson and Governor James Monroe, of Virginia, had considerable correspondence on the subject of colonizing free blacks out of the country. In the autumn of 1816 a society for this purpose was organized in Princeton, New Jersey. December 23, 1816, by resolution, the Virginia Legislature commended the matter to the attention of the General Government, and a few days afterwards the society was re-organized at Washington as the "National Colonization Society," its president being Bushrod Washington, and its organ *The African Repository*.

Its expressed object was to encourage emancipation by procuring a place outside of the United States, preferably in Africa, to which free negroes could be aided in emigrating. Its indirect object was to rid the South of the free black population, which had already become a nuisance. Its branches spread into almost every State, and for fourteen years its organization was warmly furthered by every philanthropist in the South as well as in the North. Henry Clay, Charles Carroll, and James Madison, in the South, were as hearty colonizationists as Bishop Hopkins, Rufus King, President Harrison, and Dr. Channing, in the North.

And it is noteworthy that, although the society made no real attack on slavery, as an institution, nearly every person noted after 1831 as an Abolitionist was before that year a colonizationist. Benjamin Lundy's travels through

North America were for the purpose of finding a location for a free black colony in Texas or elsewhere in Mexico. James G. Birney was for some time the society's agent and superintendent for Alabama and Tennessee. Gerrit Smith, the Tappans, and many others, began their career as colonizationists and ended it as Abolitionists.

*Liberia.*—At first free negroes were sent to the British colony of Sierra Leone. In 1820 the society tried and became dissatisfied with Sherbroke Island, and December 15, 1821, a permanent location was purchased at Cape Mesurado. In 1847, the colony declared itself an independent republic under the name of Liberia, its capital being Monrovia.

II. IMMEDIATE ABOLITION (1830–60).—In 1829–30 William Lloyd Garrison, a Massachusetts printer, engaged with Lundy in publishing *The Genius of Universal Emancipation*, at Baltimore, flung a firebrand into the powder magazine so long covered by the decorous labors of colonization and gradual abolition societies. He insisted on *immediate* abolition, meaning thereby not instant abolition so much as the use of every means at all times toward abolition without regard to the wishes of slave-owners. The effects were almost immediately apparent. Abolition, with its new elements of effort and intention, was no longer a doctrine to be quietly and benignantly discussed by slave-owners, and from 1830 the name of Abolitionist took a new and aggressive significance.

Garrison's first efforts were directed against the colonization society. January 1, 1831, he began publishing *The Liberator*, in Boston, and through its pages converted so many colonizationists that the "New England Anti-Slavery Society," founded on "immediate" abolition, was formed January 1, 1832. In 1833 Garrison visited England, and secured from Wilberforce, Zachary Macaulay, Daniel O'Connell, and other English abolitionists, a condemnation of the colonization society.



In December, 1833, the "American Anti-Slavery Society" was formed in Philadelphia by an abolition convention, Beriah Green being president, and Lewis Tappan and John G. Whittier secretaries. From this time the question became of national importance. Able and earnest men, such as Theodore D. Weld, Samuel J. May, and Wendell Phillips, traversed the Northern States as the agents of the national society, founding State branches and lecturing everywhere on abolition. The consequent indignation in the South found a response in the North with many who saw that the South would never willingly accept "immediate" abolition, and that the continuance of the abolition agitation would involve sectional conflict, and perhaps a convulsion which would destroy the Union.

Abetted or tacitly countenanced by this class, a more ignorant and violent class at once began to break up abolition meetings by mob violence. In Connecticut, in 1833, Miss Prudence Crandall, of Canterbury, Windham County, opened her school to negro girls. The Legislature, by act of May 24, 1833, forbade such schools, and Miss Crandall was imprisoned under the act. As this was ineffectual, she was ostracized by her neighbors, and finally, by arson and violence, her school was broken up. In the autumn of 1834, George Thompson, who had been instrumental in securing British emancipation in the West Indies, came to Boston, and for a year lectured throughout the North. He was denounced as a paid agent of the British Government for the destruction of the Union, was mobbed, and finally escaped from Boston in disguise, in November, 1835. For some years abolition riots were epidemic throughout the North. November 7, 1837, Elijah P. Lovejoy, a Presbyterian minister, who had established an abolition newspaper in Alton, Illinois, was mobbed and shot to death. May 17, 1838, in Philadelphia, Pennsylvania Hall, an abolitionist building, dedicated three days before, was burned by a mob. Abolition

riots then became only sporadic, but never ceased entirely until 1861.

In the South the import of the single word "immediate" was instantly perceived. By unofficial bodies rewards were offered for the capture of prominent Abolitionists, a suspension of commercial intercourse with the North was threatened, and Northern legislatures were called upon to put down abolition meetings by statute. Southern grand juries indicted several Abolitionists, and, when the accused naturally declined to appear for trial, their extradition as "fugitives from justice" was demanded by the State Governor, but without success.

The anti-slavery society had been quick to take advantage of the United States mails as an easy and secure means of introducing its publications into the South, where the society's private agents would have had short shrift. Remonstrances were at once sent to the Postmaster-General against this use of the mails, and he, while he regretted his official inability to interfere, gave Southern postmasters a strong hint that they would do well to settle the difficulty by rejecting abolitionist publications from the mails. President Jackson, in his message of December 2, 1835, requested Congress to pass a law forbidding the circulation of abolitionist publications in the mails. A bill to this effect was introduced in the Senate, carried just far enough to compel Van Buren, a candidate for the Presidency, to take open ground in its favor, and then lost. In its stead, the care of abolition documents was left, with excellent success, to the States and the postmasters.

Congress, in accepting the District of Columbia, had re-enacted the whole body of Virginia and Maryland law, and thus left slavery in full existence; but few persons seem to have denied the power of Congress to abolish slavery in the District at will. From February, 1833, a vast number of petitions were introduced, praying

Congress to abolish slavery in the District, and, after 1836, to abolish the "gag rules" by which the House had resolved to lay all such petitions on the table without consideration.<sup>1</sup>

The Garrisonian Abolitionists were, from the first, the radical wing. They believed in no union with slaveholders; they declared the Constitution "a league with death and a covenant with hell," on account of its slavery compromises, and for this reason refused to vote, hold office, or recognize the Government; they attacked the churches freely and angrily, for sympathy with slavery; they made the public speaking of female members a prominent part of their work; and woman's rights, free love, community of property, and every novel social theory, found among them the first and most sympathetic audience.

Many who would willingly have joined in opposition to slavery were repelled by dread of the odium, theological and social, consequent upon a public identification with Garrisonian license of thought, speech, and action; and a large and growing element in the American Anti-Slavery Society felt that its influence was thus impaired. In 1838 the annual report of the society made the suggestion that Abolitionist candidates for office should be nominated and supported. On this convenient rock the society split into two parts in the following year. The political Abolitionists, including Birney, the Tappans, Gerrit Smith, Whittier, Judge Jay, Edward Beecher, Thomas Morris, and others, seceded and left the original society name and organization to the Garrisonians, who at once became, in the opinion of the seceders, "a woman's rights, non-government, anti-slavery society."

In 1840 the seceders organized the "American and Foreign Anti-Slavery Society," and under this name

<sup>1</sup> See Petition.

prosecuted their work with more success than the original society of irreconcilables.

*The Liberty Party.*—November 13, 1839, a convention of Abolitionists met at Warsaw, N. Y., and incidentally nominated James G. Birney for President, and Francis J. Lemoyne, of Pennsylvania, for Vice-President. Birney had been a slaveholder in Kentucky and Alabama, and was now corresponding secretary of the national society. These nominations were confirmed by a national convention at Albany, April 1, 1840, mainly composed of New York delegates, which adopted the name of the "Liberty party." The nominees declined the nomination, but received 7059 votes in the presidential election of 1840, ranging from forty-two in Rhode Island to 2798 in New York. Liberty party tickets were now put forth in various local elections, and the political Abolitionists went into training for the election of 1844.

August 30, 1844, the Liberty party's national convention met at Buffalo. Clay had made public, August 16th, a temporizing letter to the effect that he "would be glad to see" Texas annexed at some future day. His letter cut off the slight previous possibility that the Buffalo convention might be induced to refrain from nominations. Birney and Thomas Morris of Ohio were nominated, and an active canvass was begun, quite as much against Clay as against Polk. In the presidential election of 1844, Birney and Morris received 62,300 votes, all in Northern States, ranging from 107 in Rhode Island to 15,812 in New York.

Had the Buffalo convention refrained from nominations this vote would have gone to Clay; at the least, it could not have gone to Polk. Clay would thus have had a popular majority in the Union, and the electoral votes of Michigan and New York would have gone to him instead of to Polk, giving Clay 146 and Polk 129 electoral votes.

The Liberty party's first appearance in national politics had therefore resulted in the election of Polk, the annexation of Texas, and the addition of a vast amount of slave soil to the United States. But it seems also to have convinced the thinking Abolitionists that a union of the Northern voters in favor of abolition, pure and simple, was, as yet, impossible. Slavery restriction, the exclusion of slavery from the Territories lately acquired from Mexico, offered a more promising field, and the Abolitionists, therefore, in the next two presidential elections voted the ticket of the Free Soil party. In 1856 and subsequent years, they followed the fortunes of the Republican party, which was also based on slavery restriction, but they always retained a semi-detached organization, acting rather as auxiliaries than as an integral portion of the Republican party.

*Underground Railroad.*—During the period 1850–60, the most active exertions of the Abolitionists were centred in assisting fugitive slaves to reach places of safety in Canada.<sup>1</sup> From the border of the slave States to Canada, chains of communication were formed by persons living about a day's journey apart. These were constantly engaged in secreting runaways, providing them with outfits, and passing them on to the next post, or in bringing back intelligence of those who had already escaped. In addition to these duties, committees in the larger cities were busied in providing for the rescue, by law or by force, of captured slaves from the hands of the officers. The whole organization was commonly known as the "Underground Railroad."

III. FINAL ABOLITION (1860–65).—The secession of a number of Southern States in 1860–61, and the establishment of a *de facto* government in the South, was welcome to the extreme Abolitionists, who rejoiced to be rid of the slaveholders and of political union with them. But

<sup>1</sup> See Fugitive Slave Laws.

the first shock of actual warfare brought to the surface an intense determination throughout the North and West that secession should not be allowed to become an accomplished fact.

The ensuing war<sup>1</sup> was begun in the spirit of the Congressional resolution of July, 1861, that the war "was not prosecuted with the purpose of interfering with the established institutions of the Southern States." But the Southern leaders had not taken into account the fact that their system of slavery offered a fair mark for confiscation by an enemy which they could in no way retaliate. This species of warfare was early begun by the Federal Government. The act of August 6, 1861, forfeited all claim, by the master, to the services of slaves employed in arms or labor against the Government.

This was not strictly a confiscation, but only a bar to proof of ownership. No blow at slavery, as an institution, was intended, and when proclamations abolishing slavery were issued by Gen. J. C. Frémont, in Missouri, August 30, 1861, and by Gen. David Hunter, in South Carolina, May 9, 1862, they were promptly disavowed by the President. But the next session of Congress, 1861-62, saw a more decidedly anti-slavery feeling. An additional article of war, March 13, 1862, prohibited the army from returning fugitive slaves; various other acts were passed to hinder the rendition of fugitive slaves in the Northern States; slavery in the Territories<sup>2</sup> was abolished, June 19th; and the act of July 17th freed the captured, deserted, or fugitive slaves of all persons engaged in rebellion, and authorized the employment of negro soldiers. The fugitive slave laws were not finally abolished until June 28, 1864. In all these provisions no invasion of slavery as a State institution was made; all were meant as blows at the tender spot of the Confederacy.

<sup>1</sup> See Rebellion.

<sup>2</sup> See Wilmot Provision.

The President's own wish was at first for compensated emancipation, and, in accordance with his special message of March 6th, a joint resolution of April 10, 1862, declared that the United States ought to co-operate with any State which should adopt gradual "abolishment" of slavery, by paying the State for the slaves emancipated.

The act of April 16, 1862, abolished slavery in the District of Columbia on this principle; but the border States were deaf to the repeated entreaties of the President up to the close of the session of Congress in July. In September the President, yielding to the growing anti-slavery feeling in the North, issued his preliminary proclamation, followed, January 1, 1863, by the Emancipation Proclamation. But this, by its terms, did not affect the slaves in loyal States, or within the Federal lines, nor did it affect the principle of slavery even in the rebellious States. Had the war ended without further action against slavery, every slave in the rebellious States would, indeed, have been a free man, but there would have been no bar to the immediate importation of fresh supplies of slaves from the States where slavery had not been abolished.

In his message of December 1, 1862, the President again brought up his favorite project. He now recommended the adoption of three amendments to the Constitution, providing (1) for the issue of bonds to compensate States which should abolish slavery before 1900; (2) for the validation of the Emancipation Proclamation and kindred measures; and (3) for colonizing free negroes out of the country. Bills to compensate Missouri and Maryland for abolishing slavery were introduced by members from those States early in 1863, and received favorable votes in both Houses; but the shortness of the session prevented their final passage. In West Virginia, by constitutional amendment adopted March 26, 1862, gradual

emancipation after July 4, 1863, was secured. In Missouri the State convention, which had originally been called to consider an ordinance of secession, was reconvened, and passed, June 24, 1863, an ordinance of emancipation, taking effect gradually after July 4, 1870. Congress, by act of February 24, 1864, emancipated negro soldiers, a compensation of \$300 for each being paid to loyal owners, and by act of March 3, 1865, emancipation was extended to the wives and children of such soldiers. This measure closed the record of attempts at gradual, partial, or compensated abolition of slavery.

October 12-13, 1864, Maryland adopted a new constitution whose twenty-third article finally abolished slavery in the State. Ordinances of immediate emancipation, without submission to popular vote, were passed February 13, 1864, by a convention of delegates from those portions of Virginia within the Federal lines, and, January 11, 1865, by a new State convention in Missouri.

A recapitulation of all these partial assaults on slavery will make it apparent that, after January 11, 1865, slavery had a legal existence only in the States of Kentucky and Delaware, if the action of Maryland, secured by soldiers' votes, and of irregular conventions in Virginia, Tennessee, Louisiana, and Arkansas were valid. To resolve all doubts, and give the corpse of slavery a legal burial, a constitutional amendment in 1865<sup>1</sup> was passed and ratified, by which slavery and involuntary servitude, except for crime, was abolished within the United States.

The same year saw the cessation of the publication of *The Liberator*, and the dissolution of the American Anti-Slavery Society. The work of both had been done, and done mainly, after all, by the "political" Abolitionists. By yielding the impossible point of present abolition in the States, and joining with the Republicans in the demand for the restriction of slavery to State limits, they

<sup>1</sup> See Constitution.



had aided in bringing on a conflict of a slaveholding section against the Federal Union.

In such a conflict it was inevitable that every blow at rebellion should rebound upon slavery. Had the conflict been postponed until the North and West could have been united in the ultra-Garrisonian object of a crusade against slavery, it would not have come until the population and destructive power of both sections had grown so large that the peaceable formation of two or more nationalities on this continent would have been imperatively demanded by humanity.<sup>1</sup>

PETITION.<sup>2</sup>—The first amendment to the Constitution prohibits Congress from making any law to *abridge* "the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The right to petition Congress is therefore not derived from the Constitution, but secured by it. Of course the right to offer a petition implies the duty of Congress to receive it, without which the petition would lack its most essential element. Nevertheless, from 1835 until 1844, this duty of Congress was more or less strenuously denied by Southern members in the case of petitions for the abolition of slavery and the slave trade in the District of Columbia.

February 11, 1790, a petition was offered, signed by Franklin, as president of the Pennsylvania Abolition Society, praying for the immediate prohibition of the African slave trade. This prohibition could not constitutionally be effected until 1808; nevertheless, after debate, it was received and referred by a vote of 43 to 14. Madison and other members urged "the commitment of the petition as a matter of course," so that "no notice would be taken of it out of doors." This purpose was accomplished then and afterward; as long as petitions

<sup>1</sup> See Slavery ; Emancipation Proclamation ; Rebellion ; United States.

<sup>2</sup> In U. S. History.

were received and referred, the action of the petitioners there ended.

Very few anti-slavery petitions were offered for forty years, and those few were against slavery in general. The only exception was the petition of Warner Mifflin in 1792, which was rejected on the ground that it was not a petition, and concluded with no specific prayer. This objection would not lie against the new series of petitions which were brought out by the agitation for immediate abolition which began in 1830-31. These prayed that Congress, to which the Constitution had given the exclusive power of legislation for the District of Columbia, would exercise it in prohibiting slavery therein. At first, in December, 1831, when they were referred to the committee on the District of Columbia, the committee reported formally that the prayer of the petitioners should not be granted.

As the petitions became more numerous, the committee ceased to report, and its room became "the lion's den from which there were no foot-prints to mark their return." In February, 1835, there were some complaints of this mode of procedure, and requests for a special committee, but these were not heeded. The peace was not disturbed until the following December.

*Pinckney's Resolutions.*—In December, 1835, the petitions began to come in again, and the House of Representatives showed a new disposition toward them by laying them on the table by overwhelming votes. This, however, was not enough. February 8, 1836, Henry L. Pinckney, of South Carolina, moved for and obtained a suspension of the rules to offer three resolutions: 1, that all the petitions should be referred to a select committee, 2, with instructions to report that Congress could not constitutionally interfere with slavery in the States, and 3, ought not to do so in the District of Columbia.

May 18th, the committee reported as instructed, with

an additional resolution that thereafter all petitions relating in any way to slavery or its abolition should be laid on the table without action, and without being printed or referred. May 25th the previous question, cutting off debate, was ordered by a vote of 109 to 89, and the second of Pinckney's resolutions, above mentioned, was adopted by a vote of 182 to 9. John Quincy Adams offered to prove it false in five minutes, but was silenced. On the following day the third resolution was adopted, 132 to 45, and the committee's new resolution, 117 to 68. Adams refused to vote, denouncing the resolution as a violation of the Constitution, of the rules of the House, and of the rights of his constituents.

The first of the "gag laws" was thus put in force. It was renewed in substance, January 18, 1837.

Adams at once became the champion of the right of petition. In the adoption of the rules at the beginning of each Congress, he regularly and unsuccessfully moved to rescind the "gag rule." He became the funnel through which all the anti-slavery petitions of the country were poured. Within the next four years he records the offering of nearly two thousand petitions, including petitions for the rescinding of the gag rule itself, for the recognition of Hayti, for expunging the Declaration of Independence from the journals, and for his own expulsion. Besides those whose number he mentions, there was an unknown number of others presented in batches.

The most exciting scene of the series began February 6, 1837. Adams inquired of the Speaker whether it would be in order to present a petition from twenty-two slaves. The disorderly House, catching but a hazy notion of the inquiry, at once lost its head. Suggestions to expel Adams for having attempted to offer a petition from slaves, to censure him for contempt of the House, and to take the petition out and burn it, were becoming inextricably entangled, when Adams for the first time re-

minded the Speaker that his inquiry as to the propriety of offering the petition was still pending and unanswered, and stated also that the petition was in favor of slavery.

The House saw that it had been outwitted, but it disliked to yield. "What, sir," said Waddy Thompson, of South Carolina, "is it a mere trifle to hoax, to trifle with, the members from the South in this way and on this subject? Is it a light thing, for the amusement of others, to irritate almost to madness the whole delegation from the slave States? Sir, it is an aggravation." He therefore modified his resolutions into a censure of Adams for having "trifled with the House," "by creating the impression, and leaving the House under such impression, that the said petition was for the abolition of slavery, when he knew that it was not."

By various amendments this was finally modified into a tame resolution that, since Adams had disclaimed any effort to present the petition, nothing should be done, and even this was rejected. But before the final vote, February 9th, Adams secured his coveted opportunity for defense, and his savage retaliation upon his opponents in general and in particular, interrupted by explanations and half-hearted denials from them, made up one of the few scenes in congressional history, from 1820 until 1860, when the cowering of an opposition was the result of a Northern member's speech. From this time debate with Adams was the most perilous of undertakings.

In the Senate the objection to the reception of abolition petitions had been almost simultaneous. January 7, 1836, Calhoun objected to the reception of two petitions from Ohio for the abolition of slavery in the District of Columbia, and four days afterward he renewed it upon a petition of Pennsylvania Quakers to the same effect. But the Senate was a dangerous place for such an experiment. No "previous question" could cut off debate;

Senator after Senator drifted off to the perilous questions involved in the institution of slavery itself; and the result was such a portentous debate as had never yet been heard in the Senate.

Calhoun's point was, that if the petition were couched in disrespectful language it could not be received. But in this there was a cumulative difficulty. To know the language of a petition it was necessary that it should be read, and it would always be difficult for Southern Senators to listen quietly to petitions in which their constituents and themselves were denounced as pirates, butchers, and dealers in human flesh. King, of Georgia, read Calhoun a bitter and well deserved lecture on this unstatesmanlike policy of provoking debate on the petitions; and Calhoun could only answer with the reproach that King was destroying Southern unity of action.

Calhoun's course is one of the few evidences of his lack of sincerity in desiring the preservation of the Union. A Democratic Northern Senator likened him to a pugnacious farmer in his State who was so anxious for peace with his neighbors that he was always willing to fight for it. In this instance Calhoun had abundant opportunity to agitate for the suppression of agitation. It was not until March 9th that the reception was agreed to by a vote of 36 to 10; and two days after, "the prayer of the petition was rejected" by a vote of 34 to 6.

This halting compromise between refusing to receive, and referring to a committee, was thereafter the regular mode of procedure in the Senate. It had no effect in checking the petitions, and renewed and constant debate on their reception kept the Senate in turmoil. In December, 1837, Clay urged their reception and reference, on the grounds that they were evoked mainly by a feeling in the North that the right of petition had been assailed, and that it was "better that the country should be quiet than the Senate"; but his advice met no more respectful

attention than the warning of Buchanan at the beginning, "Let it be once understood that the sacred right of petition and the cause of the Abolitionists must rise or must fall together, and the consequences may be fatal."

*The Patton Resolution.*—December 21, 1837, in the House, John M. Patton, of Virginia, secured a suspension of the rules and the previous question, and the passage of a resolution to lay on the table, without being debated, printed, read, or referred, and without further action, all petitions and papers touching the abolition of slavery or the buying, selling, or transferring of slaves in any State, district, "or territory" of the United States. Adams again protested, and refused to vote, but the resolution was passed by a vote of 122 to 74.

*The Atherton Resolutions.*—December 11, 1838, in the House, Charles J. Atherton, of New Hampshire, obtained a suspension of the rules, and offered five resolutions. The first four condemned generally any attempts at the abolition of slavery in the District of Columbia, or in the Territories, and any petitions for that object; the fifth resolved that all such petitions should be laid on the table, "without being printed, debated, or referred." Again, the previous question cut off debate, and the resolutions were passed on this and the following day, the last or "gag" resolution having in its favor 126 votes to 73. The only apparent result was the immediate appearance of a new line of petitions for the repeal of the Atherton "settlement."

*Twenty-first Rule.*—January 21, 1840, by a vote of 114 to 108, the House adopted as its twenty-first rule, that no petition, memorial, resolution, or other paper praying the abolition of slavery in the District of Columbia or the Territories, or of the interstate slave trade, should in future be received by the House, or entertained in any manner whatever. The decrease of the majority in favor of the repression principle in this vote was striking, and

was in itself an evidence that the system could not endure very much longer.

Adams had found the support which he had at first lacked, and his yearly recurring motions to omit the twenty-first from the list of rules were defeated by steadily dwindling majorities. The rule, however, only increased the strength of language of the petitions, and their number as well: 34,000 signatures had been affixed to petitions of this nature in 1835-6; 110,000 in the session after the Pinckney resolutions; over 300,000 after the Patton resolutions; and after the twenty-first rule was adopted the signatures to petitions on all the cognate subjects were practically beyond counting.

January 14, 1842, another exciting scene began in the House, Adams being again the centre of it. He offered a petition from citizens of Haverhill, Massachusetts, praying for a dissolution of the Union, and asked for its reference to a committee to set forth reasons for the rejection of the petition. The anger of the Southern members flamed out again. Suggestions were again made to expel Adams, to censure him, or to burn the petition. Adams at first only replied by advising his leading opponents to "go to a law school, and learn a little of the rights of the citizens and of the members of this House"; but, when the House had voted, 118 to 75, to take into consideration the resolutions of censure offered by Thomas F. Marshall, of Kentucky, the spokesman of the Southern caucus, the debate was adjourned until January 28th. From that day it continued until February 7th, with a virulence surpassing that of the first. Adams had his opponents at a disadvantage, for many of them were avowed disunionists, but he used also every other advantage which could be used.

The character of the whole debate may be conceived from Adams's reference to Wise, of Virginia, his bitterest opponent, as having come into that hall from the Graves-

Cilley duel, of which he was a promoter, "with his hands dripping with human gore, and a blotch of human blood upon his face"; and from Wise's temperate reply that "the charge was as base and black a lie as the traitor was base and black who uttered it." At last Adams, worn out and almost breathless, but triumphant over every assailant, allowed a motion to "lay the whole subject on the table forever," and it was carried by a vote of 106 to 93.

At the special session of 1841 Adams's regular motion to omit the twenty-first rule had actually been carried, by a vote of 112 to 104, on a motion to adopt the rules of the last House for ten days only; but this was afterward reconsidered and lost. Session after session the majority against Adams's motion dwindled. At last, December 3, 1844, the House, by a vote of 104 to 81, refused to lay his motion on the table, and, by a vote of 108 to 80, abolished the twenty-first rule. The ten years' gripe of John Quincy Adams upon the gag system had choked it at last and forever. Thereafter, petitions of every nature were quietly relegated to the limbo of such papers, the committee room.

December 12, 1853, the ancient rule requiring the presentation of petitions in the House was rescinded. Since that time petitions have been delivered to the clerk of the House, indorsed with the name of the member presenting them and of the committee to which they are to be referred. The clerk then transfers them to the proper committees, and notes their presentation on the journal.

THE "CREOLE" CASE.<sup>1</sup>—The brig *Creole*, with a cargo of 130 slaves, sailed from Hampton Roads for New Orleans October 27, 1841, this species of coasting slave trade having been allowed and regulated by act of March 2, 1807. November 7th, seventeen of the slaves rose, killed

<sup>1</sup> In U. S. History.



one of the owners, mastered the vessel, and ran her into Nassau, where the authorities, as they had done in several previous cases of the kind, set at liberty all not expressly charged with murder. The Administration demanded their surrender by Great Britain on the ground that they were on United States soil while under the United States flag, and were therefore still property, by municipal law, even on the high seas. They were not surrendered, and the claim for them was finally merged in the negotiations which resulted in the treaty of August 9, 1842, for the extradition of criminals.

*Giddings's Resolutions.*—During the progress of the negotiations, March 21, 1842, J. R. Giddings, of Ohio, offered a series of resolutions in the House of Representatives which were the basis of the war against slavery during the succeeding eighteen years.

They were in brief as follows: 1. That, before 1789, each State had exclusive jurisdiction over the subject of slavery in its own territory. 2. That this jurisdiction had never been delegated to the Federal Government. 3. That commerce and navigation on the high seas were under the jurisdiction of the Federal Government. 4. That slavery, being an abridgment of the natural rights of man, can exist only by force of positive municipal law, and is necessarily confined to the jurisdiction of the [State] power creating it. 5. That a ship belonging to citizens of a State is under the jurisdiction of the United States only, when it reaches the high seas. 6. That when the *Creole* left Virginia, the slave laws of Virginia ceased to apply to her cargo. 7. That the cargo, in resuming liberty, violated no law of the United States. 8, 9. That attempts to re-enslave the escaped slaves, or to maintain the coastwise slave trade, were unauthorized by the Constitution, subversive of the rights of the free States, and prejudicial to our national character.

The reading of these resolutions roused intense excite-

ment. By a meagre majority the House ordered the previous question, cut off debate, and passed a resolution prepared by J. M. Botts, of Virginia, declaring that the conduct of Giddings, in offering resolutions which justified mutiny and murder, and tended to complicate the pending negotiations between the United States and Great Britain, was "unwarranted and unwarrantable, and deserved the severest condemnation of the people of this country, and of this body in particular."

Giddings resigned his seat, and was at once re-elected by an overwhelming vote, with instructions from his district to present his resolutions again and to press them to a vote. This he was not allowed to do: indeed, it would seem impossible for a Democrat<sup>1</sup> to vote against the first three resolutions, from which the others logically follow, without a denial of every tenet of the party. For the remainder of this Congress "resolution day" was, by successive votes of the House, regularly devoted to other business. But the principle of the resolutions lived, and upon it parties were reorganized after 1850.<sup>2</sup>

On Petition see 1 Benton's *Debates of Congress*, 201, 207; 13 *ib.*, 24 (Pinckney's resolutions), 266 (Adams's first trial: his speech is at page 283); 12 *ib.*, 705 (Calhoun's motion); 13 *ib.*, 566 (Patton resolutions), 702 (Atherton resolutions); 14 *ib.*, 289 (twenty-first rule); Jay's *Miscellaneous Writings*, 349; 2 Calhoun's *Works*, 466; 9 Adams's *Memoir of J. Q. Adams*, 350; 11 *ib.*, 109; 61 Niles's *Register*, 350 (Adams's second trial); 14 *Democratic Review*, 303 (the best argument in favor of the twenty-first rule); 2 Benton's *Thirty Years' View*, 150; 1 Greeley's *American Conflict*, 143; Giddings's *History of the Rebellion*, 108, 158; 2 Wilson's *Rise and Fall of the Slave Power*, 346; 2 von Holst's *United States*, 236, 470; Morse's *Life of J. Q. Adams*, 249, 307; 18, 22, 38 *Rules of the House of Representatives*; speech of J. Q. Adams on Constitutional

<sup>1</sup> See Construction.

<sup>2</sup> See Slavery.

War Power over Slavery in the States; 2 *American Political Orations*, speeches of Calhoun and Clay.

On *Creole* case see 2 von Holst's *United States*, 479; 2 Benton's *Thirty Years' View*, 409; 1 Wheeler's *History of Congress*, 275; Giddings's *History of the Rebellion*, 173; 6 Webster's *Works*, 303. The previous cases of the kind will be found in 2 Benton's *Thirty Years' View*, 432-434, and the resolutions in full in Giddings's *History of the Rebellion*, 180. The whole affair, pregnant as it was with future results, is entirely ignored in 14 Benton's *Debates of Congress*. The act of March 2, 1807, is in 2 *Stat. at Large*, 426.

References on Abolition agitation: I. See von Holst's *United States*, 277, etc.; Wilson's *Rise and Fall of the Slave Power*; Greeley's *American Conflict*; *The African Repository*; Jay's *Miscellaneous Writings on Slavery*; Earle's *Life of Benjamin Lundy*; Goodell's *Slavery and Anti-Slavery*. II. See Garrison's *Speeches*; May's *Recollections*; Johnson's *Recollections*; Giddings's *Speeches in Congress*, *Exiles of Florida*, and *History of the Rebellion*; Beriah Green's *Sketch of Birney*; Charles Osborn's *Journal*; Lovejoy's *Life of Lovejoy*; Tappan's *Life of Tappan*; Child's *Life of Isaac T. Hopper*; Frothingham's *Life of Gerrit Smith*; Gerrit Smith's *Speeches in Congress*; Still's *Underground Railroad*; and authorities under articles referred to. III. See Raymond's *Life of Lincoln*; Arnold's *Life of Lincoln*; Poore's *Federal and State Constitutions*; McPherson's *Political History of the Rebellion*; W. H. Smith's *Political History of Slavery*; Woodburn's *Political Parties and Party Problems in the United States*; Curtis's *History of the Republican Party*; Wendell Phillips's oration on *The Philosophy of Abolition*; Johnston and Woodburn's *American Political Orations*; works of Wm. Ellery Channing, on *Slavery, Abolitionists*; Julian's *Life of Giddings*; later authorities under *Rebellion and Slavery*; and authorities

under Emancipation Proclamation. For acts of August 6, 1861; July 17, 1862, and April 16, 1862, see 12 *Stat. at Large*, 319 (§ 4), 589 (§§ 9–11), 376. For acts of February 24, 1864, and March 3, 1865, see 13 *Stat. at Large* (38th Cong.), 6 (§ 24), 571. For final abolition of slavery in Territories, see Wilmot Proviso.

## CHAPTER III

### TEXAS AND OREGON

**I. TEXAS.**—The inevitable result of the two previous annexations<sup>1</sup> was the annexation of Texas. It had been persistently claimed before 1763 by Spain; and France, though claiming it as part of Louisiana, had made only a few futile attempts to colonize it. It had been one of the ultimate objects of the Burr conspiracy. During Wilkinson's hasty operations to defend New Orleans against Burr in October, 1806, he had agreed with the Spanish commander upon the Sabine as a provisional boundary between the Spanish and the American territory, and upon the consequent suspension of the American claim to Texas as part of Louisiana; and the treaty of 1819<sup>2</sup> made this boundary permanent. Considerable opposition, of which resolutions offered by Henry Clay were an expression, was manifested against the "alienation" by treaty of soil to which the United States had a claim, but the annexation of Florida covered all dissatisfaction in the South, and when Mexico's revolt was successful, by the treaty of Cordova, February 24, 1821, "Texas and Coahuila" became one of the states of the Mexican republic.

The Missouri struggle had shown that the union of the two sections in the United States was as yet only factitious; that the operation of economic laws would

<sup>1</sup> See Louisiana and Florida.

<sup>2</sup> See p.

inevitably drive immigration away from slave soil and toward the free territory of the Northwest; and that, consequently, in the sectional race for the manufacture of new States and the control of the Senate, the South was doomed to defeat if the Sabine remained as the boundary. Therefore, so early as 1821, the adventurous and lawless population of the Southwest, under the direction or with the silent sympathy of far-seeing Southern leaders, began systematic efforts to pierce the barrier of Mexican exclusiveness and effect an entrance into Texas.

Under the guise of persecuted American Roman Catholics, enterprising men obtained land grants from Mexico and filled them with settlers who had at least as much reverence for Catholicism as for any other form of religion. Offers were made in 1827 and 1829 by Clay and Van Buren, successively Secretaries of State, of \$1,000,000 and \$5,000,000 for Texas, but without effect. In 1833 Texas had grown so far in population that it disdained to be longer a part of Coahuila, and by convention, April 1st, formed a Mexican state constitution of its own.

In 1835 the Mexican congress abolished all the state constitutions, and created a dictator; and, March 2, 1836, Texas put into practice the doctrine of secession by declaring its independence of Mexico. After a brief war, marked by the inhuman Mexican massacres of Goliad and the Alamo, Houston, the Texan commander, with 700 men, met Santa Anna, the Mexican President, with 5000 men, at the San Jacinto, April 10th, and totally defeated him. Santa Anna, a captive and in mortal fear, was glad to obtain his freedom by signing a treaty which acknowledged the independence of the republic of Texas, but which Mexico naturally refused to ratify. In March, 1837, the United States, and, soon after, England, France, and Belgium, recognized the new republic, which

may thereafter be fairly considered independent, though never acknowledged as such by Mexico.

The finances of Texas early fell into extreme disorder. Her government had borrowed and expended so recklessly that borrowing would no longer avail, and its operations had almost come to a standstill for sheer want of money. Under these circumstances annexation was as desirable to Texas as to the South, and in August, 1837, by her Minister at Washington, Texas made application to the executive for membership in the United States. A proposition to that effect was introduced in the Senate, by Preston, of South Carolina, and tabled by a vote of 24 to 14.

The matter then rested for some years, and Texas, undisturbed by Mexico's continued refusal to recognize her, proceeded in the prodigal sale and distribution throughout the South and Southwest of a vast mass of land warrants, whose owners were at once converted into advocacy of Texas and annexation. January 10, 1843, Gilmer, Member of Congress from Virginia, in a letter to a Baltimore newspaper, eloquently appealed to the people to annex Texas in order to forestall Great Britain in so doing; and his appeal was seconded by the legislatures of various Southern States.

From this time Texas annexation became a game, skillfully played in partnership by the Southern politicians, who wished to increase the number of Southern States, and the Texas land and scrip speculators, who wished to make their worthless ventures profitable. A letter was obtained from ex-President Jackson, March 12, 1843, warmly counselling immediate annexation.

The Democratic National Convention was put off from December, 1843, until May, 1844, and in the interval Van Buren, the chosen candidate of the Northern Democracy, was formally questioned by letter as to his position on annexation. April 20, 1844, Van Buren de-

clared against it, as also did Clay, the leading Whig candidate, April 17th. May 17th, the Democratic convention met at Baltimore, and as a preliminary adopted the rule of the conventions of 1832 and 1835, which has since been the rule in all Democratic conventions, that a nomination should only be by a two thirds vote. This made Van Buren's nomination impossible, and insured to the Southern minority the ultimate choice of an annexation candidate. On the eighth ballot Van Buren was withdrawn, having fallen from 146 to 104 out of 266 votes, and on the next ballot Polk was nominated. Not only was the candidate strongly in favor of immediate annexation; the platform also warmly demanded the *re*-occupation of Oregon, and the *re*-annexation of Texas.

In the meantime, an annexation treaty had actually been concluded with Texas, April 12, 1844, by Calhoun, whom Tyler, in the course of his drift back toward the Democratic party, had called into his Cabinet, as Secretary of State, and who had declared his only object in the Cabinet to be the annexation of Texas; but it was rejected by the Senate by a vote of 16 ayes to 35 nays.

This treaty fixed the western boundary of Texas, as Texas herself had done in 1836, at the Rio Grande, thus taking in the country between the Nueces and the Rio Grande, which had been settled by Spaniards since 1694 as the province of Coahuila, and had been peaceably in Spanish and Mexican possession ever since, though Texas had attempted some formal exercises of jurisdiction over it. In this disputed territory lay the germs of the Mexican War.

In the presidential election of 1844 votes were gained for Polk in the North by the demand for the re-occupation of Oregon, and by the cry of "Polk, Dallas, and the tariff of 1842"; but in the South the whole question turned on Texas, and "Texas or disunion" became a

<sup>1</sup> See Tariff.



common toast. Polk's election was accomplished in part by the vote which the Liberty party<sup>1</sup> threw away on Birney, which would have given New York and Michigan to Clay, and in part by indubitable fraudulent voting in Plaquemines parish, in Louisiana, which gave the vote of that State to Polk. Nevertheless, his success was taken as a popular indorsement of Texas annexation, and in the next session of Congress the doubtful members hurried to join the popular side.

January 25, 1845, a joint resolution was passed by the House, by a vote of 120 to 97, that "Congress doth consent that the territory properly included within, and rightfully belonging to, the republic of Texas, may be erected into a new State, to be called the State of Texas," the consent being given on three conditions, 1st, that evidence of the formation of the new State should be sent to Congress for final action on or before January 1, 1846; 2d, that the public property of the republic should be transferred to the United States; and 3d, and most important,<sup>2</sup> as follows:

"*Third.* New States of convenient size, not exceeding four in number, in addition to the said State of Texas, and having sufficient population, may hereafter, by the consent of said State, be formed out of the territory thereof, which shall be entitled to admission under the provisions of the Federal constitution; and such States as may be formed out of that portion of said territory lying south of thirty-six degrees thirty minutes north latitude, commonly known as the Missouri Compromise line, shall be admitted into the Union with or without slavery, as the people of each State asking admission may desire. And in such State or States as shall be formed out of said territory north of said Missouri Compromise line, slavery or involuntary servitude (except for crime) shall be prohibited."

<sup>1</sup> See Abolition, II.

<sup>2</sup> See Dred Scott Case, Kansas-Nebraska Bill, Compromises, V.

To some of the Senators this formation of a new State out of territory which had never been formally annexed seemed utterly unconstitutional, and an amendment, prepared by Senator Walker, of Wisconsin, was added, authorizing the President, if he should deem it advisable, to first make a treaty of annexation with Texas. The whole was then passed by a vote of 27 to 25, and agreed to by the House. No such treaty was ever made.

The opponents of annexation have always claimed that the annexing policy was brought about by a piece of sharp practice. The resolution for annexation could have secured its scant majority in the Senate only by adding the Walker amendment giving the President discretionary power to bring Texas in under a treaty instead of by joint resolution, and even this could secure a bare majority only after Mr. Polk, the President-elect, was induced to pledge himself to act by treaty instead of by joint resolution. Tyler forestalled Polk and leaped at the chance of ending his presidency with the *éclat* and the honor of annexation. On the last day of his term he sent a special messenger with the joint resolution to secure the assent of Texas to annexation by that quicker and easier process. Polk refused to recall this messenger and he was accused of collusion with Tyler and the annexationists and of bad faith with the opponents of annexation. On June 18th, the unanimous consent of the Texan Congress was obtained to annexation, and this was ratified by a popular convention on July 4th.

A joint resolution was passed in the House, December 16, 1845, by 141 to 56, and in the Senate, December 22d, by 31 to 13, for the admission of Texas as a State, and its annexation was complete without the formality of a treaty.

The power of annexation by treaty, which had been doubted, but exercised, in 1803, had thus been carried,

in 1845, to annexation even without treaty, and both by the strict constructionist party.<sup>1</sup> The annexation of Texas added 376,133 square miles to the United States.

*New Mexico and Upper California.*—These two pieces of territory had been conquered during the Mexican war, the former (including Utah, Nevada, and a large part of Arizona, New Mexico, and Colorado) by Kearney, and the latter by the navy under Commodore Stockton and a small land force under Frémont, and both were held as conquered territory until the end of the war.

From the opening of hostilities, the acquisition, by force or purchase, of a liberal tract of Mexican territory, as "indemnity for the past and security for the future," had been a principal object of the war, and at its close, by the treaty known as the treaty of Guadalupe Hidalgo, signed February 2, 1848, by Mr. Nicholas P. Trist, and three Mexican commissioners, and ratified by the Senate March 10th, the territory above named was added to the United States, the price being fixed at \$15,000,000, besides the assumption by the United States of \$3,250,000 in claims of American citizens against Mexico.

The territory thus annexed, including that part of New Mexico east of the Rio Grande, which was claimed by Texas, and for which Texas was afterwards paid \$10,000,000 by the United States, added to the area of the United States 545,783 square miles.

*Gadsden Purchase.*—During the next five years disputes arose as to the present southern part of Arizona, the Mesilla Valley, from the Gila River to Chihuahua. A Mexican army was marched into it by Santa Anna and preparations were begun for a renewal of war. By the Gadsden treaty, December 30, 1853, so called from its negotiator, the United States, at the price of \$10,000,000, obtained the disputed territory, as well as a right of transit for troops, mails, and merchandise over the

<sup>1</sup> For the further results see Wilmot Proviso, Compromises, V.

isthmus of Tehuantepec. By this annexation, 45,535 square miles were added to the United States.

II. OREGON—NORTHWEST BOUNDARY. *I. Claims.*—The territory bounded north by latitude  $54^{\circ} 40'$ , east by the Rocky Mountains, south by latitude  $42^{\circ}$  (the northern boundary of California), and west by the Pacific Ocean, has been claimed at various times, and to varying extents, by Russia, Spain, Great Britain, and the United States. As the claims overlapped and interfered with one another, they may be first stated.<sup>1</sup>

1. The claim of Russia rested mainly on occupation by fur traders, and its southern boundary was at first undefined. April 5–17, 1824, a treaty was arranged between the United States and Russia, which was ratified by the former January 11, 1825. By its third article no settlements were to be made under the authority of the United States north of latitude  $54^{\circ} 40'$ , nor any Russian settlements south of that line. February 28, 1825, by a treaty between Russia and Great Britain, the same parallel was made a part of the boundary between their respective settlements. By these two treaties Russia at once secured her southern boundary, and withdrew from the imbroglio.

2. The claim of Spain, in some respects the best of all, rested in discovery, backed by occupation. The discovery rested in the voyages of Cabrillo and Ferrelo in 1543, to latitude  $43^{\circ}$ ; of Juan de Fuca in 1592 to parallel  $49^{\circ}$ , and the strait which bears his name; of Vizcaino in 1603, to latitude  $43^{\circ}$ ; of Perez in 1774, to latitude  $54^{\circ}$ ; of Heceta in 1775, to latitude  $48^{\circ}$ , discovering, but not entering, the river St. Roque (now the Columbia); and of a few minor voyagers as far north as latitude  $59^{\circ}$ . Occupation had been begun as early as 1535, by a land expedition under Fernando Cortez, and Jesuit settlements

<sup>1</sup> For the northeast boundary, see Maine.

were gradually pushed farther north, though they never passed latitude 42°. Nevertheless, Spain asserted exclusive control of the coast beyond latitude 42°. In May and June, 1789, Spanish armed vessels seized several British vessels in Nootka Sound, and war was only averted by the Nootka Sound convention, or treaty of the Escorial, October 28, 1790, by which British trading buildings in Nootka Sound were to be restored, the right of trade was to be secured to both parties, but neither was to land on coasts already occupied by the other. In 1803, by the treaty ceding Louisiana,<sup>1</sup> the claim of France, which was really the claim of Spain, to an indefinite territory on the Pacific, was transferred to the United States; and by the Florida treaty of 1819-22,<sup>2</sup> Spain fixed latitude 42° as the Pacific portion of the boundary line between her American territory and the United States. Spain thus retired from the field, leaving but two contestants for the disputed territory, Great Britain and the United States.

3. Great Britain had little or no claim by discovery. Drake had seen the coast in 1580; Cook had examined it slightly in 1778; and Vancouver much more thoroughly in 1793; but all these were rather rediscoverers than discoverers. Occupation was actually begun in 1788 by Meares, an English lieutenant; but he was under the Portuguese flag at the time, with letter of marque against British vessels who should molest him, so that his occupation could hardly weigh heavily for Great Britain. In 1793, 1806, and 1811 enterprising fur traders, in private employ, pushed into the Oregon country, and established trading posts there; but there was no attempt at permanent settlement south of latitude 49°.

4. The claim of the United States deduced from Spain is at least doubtful. The claim by discovery rests on two grounds, the voyage of Gray, and the expedition of

<sup>1</sup> See Louisiana.

<sup>2</sup> See Florida.

**Lewis and Clarke.** In 1792 Captain Gray, of Boston, entered the river St. Roque, at which Heceta had only guessed, and changed its name to the Columbia River, after the name of his vessel. In 1805-6 Lewis and Clarke, under orders from President Jefferson, crossed the Rocky Mountains, struck the southern headwaters of the Columbia, floated down that river to its mouth, and explored very much of the Oregon country. On the strength of Gray's discovery the United States claimed all of the country drained by the Columbia; but so extensive a claim is hardly tenable in international law. Lewis and Clarke's expedition was more important: it was made under government authority, and it covered most of the territory south of latitude 49°; while the British fur traders were not in public employ, and their explorations were north of latitude 49°.

On the whole, if discovery alone were in question, latitude 49°, as finally fixed, would seem to be equitable: south of it the United States had officially explored the territory; and north of it Great Britain had done so, though not officially. In 1811 John Jacob Astor, of New York, established a trading post at the mouth of the Columbia, and named it Astoria; but during the war of 1812 it was captured by the British, and named Fort George. In 1818 it was restored to the United States Government, but its private owner abandoned it. Attempts in 1822 and 1827 to organize American fur companies for operating in the Oregon country were unsuccessful, owing to the powerful rivalry of well-established British companies; but they led the way to a more legitimate occupation, by immigration, in which Great Britain could not compete. This began in 1832, and after 1838 no autumn passed without an increasing supply of permanent settlers across the Rocky Mountains. In 1845 the American population was nearly three thousand, and there was no probability of any decrease in the increase

for the future. Here, after all, lay the true ground of the American claim—in legitimate and permanent settlements; and, as these filled the space covered by Lewis and Clarke's explorations, the two together make a valid claim up to latitude  $49^{\circ}$ .

*II. Settlement.*—The definitive treaty of peace of September 3, 1783, after defining the northeastern boundary to the St. Lawrence River, continued the northern boundary between the United States and British America up through the middle of the St. Lawrence River and the Great Lakes to Long Lake, on the northern coast of Lake Superior; thence northwesterly by the water communications through Rainy Lake to the Lake of the Woods; and thence to the river Mississippi, which was then the boundary between the United States and Spanish America. The cession of Louisiana to the United States in 1803 made necessary a definition of the northern boundary between the new cession and British America; and this was settled by the second article of the convention of October 20, 1818, which fixed latitude  $49^{\circ}$  as the boundary from its intersection with the Lake of the Woods to the Stony [Rocky] Mountains. West of the Rocky Mountains the whole territory was to be open, for ten years, to the vessels, citizens, and subjects of both powers, without prejudice to the claims of either. By the convention of August 6, 1827 (ratified by the United States, April 2, 1828), the joint occupation of the Oregon country by Great Britain and the United States was continued indefinitely, with the provision that either party might annul and abrogate it, on giving twelve months' notice to the other.

In both these negotiations the American negotiators laid formal claim to the whole territory drained by the Columbia, included generally between parallels  $42^{\circ}$  and  $52^{\circ}$  of latitude; but they showed a willingness to compromise on latitude  $49^{\circ}$  to the Pacific.

The British negotiators, on the other hand, seem to have been willing to accept latitude  $49^{\circ}$  to its intersection with the Columbia; but thence to the Pacific they insisted on the Columbia itself as a boundary, thus adding to British America nearly the whole of the present State of Washington. In such a conflict of claims, the only possible line of action was to continue the joint occupation until one party should be able to assert an exclusive right to some part of it.

As American immigration increased, the certain perils of a joint occupation increased with it. The magistrates of neither country could have or exercise jurisdiction over the citizens of the other; and difficulties between parties of different nationalities could therefore have no forum for settlement. In 1838 propositions to organize some system of justice in the Oregon country began to be offered in Congress. At first these were only to imitate the British system of erecting forts and providing magistrates for the trial of offences, without any design to terminate the joint occupation; but the settlement of the northeastern boundary question in 1842 had an unfortunate effect on the discussion of the true northwestern boundary.

There was considerable dissatisfaction in both countries over the result of the treaty of 1842, and a determination to insist on their respective claims in Oregon. In the United States this feeling took two distinct forms. 1. The treaty by which Russia had agreed to settle no farther south than latitude  $54^{\circ} 40'$  seems to have produced a belief that this line was the proper boundary. Forgetting that the treaty could bind only the parties to it, and that Great Britain could appeal to a precisely similar contemporary treaty with Russia, there were many in the United States who were willing to insist on the Russian boundary even at the price of a war with Great Britain. This feeling was popularly summed up as "fifty-four-forty-or-fight."



2. The "Monroe Doctrine" was strongly appealed to, in order to sustain the view that to yield any part of the Pacific coast to Great Britain would be to consent to the formation of a European colony on this continent, and that, too, as our nearest neighbor. Of this feeling Douglas was the ablest exponent.

In this state of public feeling, the Democratic National Convention of 1844 declared for the "reoccupation of Oregon," on the ground that our title to the whole of it was clear and unquestionable. It was, to be sure, coupled with a demand for the "reannexation of Texas"; but it met a popular feeling in the North and West which it was difficult to resist. Democratic success in 1844, and the decided tone of President Polk's inaugural in 1845, made the Oregon question prominent from the beginning of his administration.

Under the preceding (Tyler's) administration, the Secretary of State, Calhoun, had been conducting a negotiation on the Oregon question with the British Minister, Pakenham, from July, 1844, until January, 1845. Calhoun had offered to take latitude  $49^{\circ}$  as the boundary; Pakenham had offered, in return, the Columbia River from latitude  $49^{\circ}$  to the Pacific, and when this was declined had proposed an arbitration, which Calhoun refused. This refusal, and the declaration of the inaugural that our title to "the whole of Oregon" was indisputable, and that our settlers there must be protected, raised the war feeling high in Great Britain. This seems to have had an influence on the President. In July, 1845, his Secretary of State, Buchanan, again proposed latitude  $49^{\circ}$  as a boundary, which was again refused; but the rumor of the offer evoked such a storm that the Secretary withdrew it.

The meeting of Congress in December, 1845, was the signal for a renewal of the question. Resolutions were introduced in both Houses that the "whole of Oregon"

belonged to the United States, and that there was no power in the President and Senate to alienate by treaty any part of the soil of the United States.

Senators Allen, of Ohio, and Hannegan, of Indiana, were the most persistent champions of these measures. On the contrary, the opposition, Calhoun being its ablest speaker, held that, since immigration to Oregon could only come from the United States, it was wiser to maintain the joint occupation until the natural process of crowding out should compel Great Britain to withdraw. The former then began to press a resolution directing the President to give Great Britain the twelve months' notice to terminate the joint occupation. The latter united in holding, 1, that as the notice was part of a treaty, the treaty power alone could give it; 2, that the notice was in the direct line of war with Great Britain, for which the country was not ready; and 3, that in any event the resolution should only authorize the President to give the notice when in his judgment the proper time had come; that is, when the United States should be ready for war. This the other side answered by pressing bills for the increase of the navy.

To strengthen the hands of the anti-war Democrats and Whigs, the President sent to Congress, February 7, 1846, the correspondence between the two governments since December. From this it appeared that Great Britain was arming; that the United States had asked for the reasons of her preparations; and that she had frankly acknowledged that she was incidentally preparing for an American war.

In March, after the House had passed the directory resolution for notice, a friend of the President in the Senate advised a compromise on latitude 49° as the boundary. He declined to calm the resulting excitement by acknowledging the President as his authority. April 16th the Senate passed a discretionary resolution for

notice; and two days later the House amended it by "authorizing and requesting" the President to give notice. April 23d, both Houses agreed to a new resolution, which, while varying the form of the Senate resolution, retained its essence, that the President be "authorized" to give the twelve months' notice, and that negotiations should continue.

June 6, 1846, the British Ambassador offered to accept latitude  $49^{\circ}$  as the boundary to the channel between Vancouver's Island and the mainland, thence down the middle of the channel and the Strait of Fuca to the Pacific, with free navigation, to both parties, of the channel and the Columbia. Even this did not wholly relieve the President, for he had no mind to array himself against the "fifty-four-forty" idea. He therefore endeavored to throw the responsibility upon the Whig Senate by requesting its advice on the acceptance of the convention—a process unused since Washington's time. It must be recorded to the credit of the Whigs who were not ignorant of his purpose, that they advised the ratification of the convention, June 12th. Ratifications were exchanged at London, July 17, 1846, and the Oregon question, in its main features, was settled finally.

There was still, however, one minor point, which was not settled until 1872. The commissioners appointed to run the boundary could not agree on the true water channel through the middle of which it was to run. The British insisted on the Rosario Straits; the Americans on the Canal de Haro. By the thirty-fourth article of the treaty of Washington, in 1871, it was agreed to submit the question finally to the Emperor of Germany as arbitrator. In the following year the arbitrator decided in favor of the Canal de Haro.

References on Texas: 2 von Holst's *United States*; 1 Greeley's *American Conflict*; Wise's *Seven Decades*; 11 Adams's *Memoirs*; Jay's *Review of the Mexican War*; 4

Calhoun's *Works*; 2 Benton's *Thirty Years' View*; 16 Benton's *Debates of Congress*; 1 Rhodes's *History of the United States*; Julian's *Life of Giddings*; Wilson's *Slave Power*; Williams's *Life of Houston*; W. H. Smith's *Political History of Slavery*; W. E. Channing's Letter to Clay, in *Works of Channing*; Schouler's *History of United States*; 2 Schurz's *Life of Clay*; Burgess's "Middle Period," *Am. Hist. Rev.*, April, 1900.

References on Oregon: 8 *Stat. at Large*, 80, 248, 360, 9 *ib.*, 869, and 17 *ib.*, 863 (for treaties of September 3, 1783, October 20, 1818, August 6, 1827, June 15, 1846, and May 8, 1871, respectively); 3 von Holst's *United States*, 161, 216, 273; 15, 16 Benton's *Debates of Congress* (see index); *Statesman's Manual* (Polk's Messages); Greenhow's *Northwest Coast*, 1840, and *History of Oregon and California*, 1845 (the authorities cited in the footnotes form a bibliography up to date); Irving's *Astoria and Bonneville's Expedition*; *Reports of Lewis and Clarke*, and Frémont; Rush's *Residence at the Court of London* (London ed. of 1872), 372; 1 Dix's *Speeches and Addresses* (the best statement of the American claims); *Edinburgh Review*, July, 1845 (probably the fairest summary); 2 N. W. Senior's *Essays*; Dunn's *Oregon Territory*; Falconer's *Oregon Question*; Robertson's *Oregon: Our Right and Title*; T. Twiss's *Oregon Question Examined*; Wallace's *Oregon Question Determined*; 2 Benton's *Thirty Years' View*, 660; 4 Calhoun's *Works*, 260; 2 Webster's *Works*, 322; 5 *ib.*, 60; 2 Webster's *Private Correspondence*, 215, 230; 1 Coleman's *Life of Crittenden*, 236; Cutts's *Constitutional and Party Questions*, 61; Stanwood's *Presidency*; E. G. Bourne, *Am. Hist. Rev.*, January, 1901; Senate Documents, 31st Congress, 1st Session, No. 29.

## CHAPTER IV

### THE WILMOT PROVISIO

**A**LTHOUGH this principle has been baptized with the name of David Wilmot, a Democratic Congressman from Pennsylvania, who attempted to apply it in 1846 to the territory about to be acquired from Mexico, it is in reality the outcome of that principle of congressional control over the Territories which has constantly been applied in practice since the nation first owned Territories.

The Ordinance of 1787 (see that title) prohibited slavery in the Northwest Territory; and in the territory southwest of the Ohio the prohibition of slavery was not imposed, because Congress, in accepting the cessions of it by the States, had voluntarily bound itself not to do so. In the organization of the Territories, while Congress has allowed the election of the lower house of the legislature by the people, it has always retained to the National Government the appointment of the judges and of the governors, with a veto on the territorial legislatures, and has even retained a power to veto, in the last resort, the action of territorial governors and legislatures together. Its power to prohibit polygamy and slavery in the Territories has always rested on exactly the same foundation.

In the case of slavery it would probably never have been denied, but for the influence occasioned by the growth of slavery. Jefferson's prohibition of slavery in

both the northwest and southwest Territories came within a hair's breadth of success in 1784; and the more limited prohibition of 1787 had practically no opposition. In the case of Missouri, in 1819-20, there was hardly any denial in the South, while there was a unanimous affirmation in the North, of the power of Congress to prohibit anything in the Territories, even slavery.

The Southern argument was altogether different from any such denial. It showed that the National Government had acquired the territory west of the Mississippi, when slavery was permitted therein by law; that it had taken no steps whatever to prohibit slavery therein, but had allowed it to extend north through Missouri; and that, when Missouri had thereby become a slave State through the continued policy of Congress, confirmed by the admission of Louisiana as a slave State in 1812, it was not just, by a sudden reversal of policy in the case of Missouri, to destroy property rights which Congress, at least by *lashes*, had allowed to grow up.

Leaving out of question the morality of slavery, the Southern reasoning was just, and indeed, *mutatis mutandis*, was exactly the reasoning of the Free Soilers of after days. In 1820,<sup>1</sup> Congress recognized its justice: it refrained from touching slavery in that part of the annexation where it had been allowed to grow up, in the States of Louisiana and Missouri, and in the Territory of Arkansas; but it took absolute assurance for the future by prohibiting slavery forever in the rest of the annexation, that part lying north of latitude 36° 30'.

The mistake lay in allowing this to go forth as a compromise, a bargain, a division of territory between the sections, instead of a plain exercise of rightful power by Congress, coupled with an act of condonation for the past. There could then have been no attempt to stamp the Wilmot Proviso in 1846 as a novelty in American legislation.

<sup>1</sup> See Compromises.

I. BEFORE ANNEXATION.—Prohibitions of slavery were inserted in the organization of the new Territories formed from the Louisiana Purchase, Iowa in 1838, and Minnesota in 1849, by the following provision: "The laws of the United States are hereby extended over and declared to be in force in the said Territory, so far as the same, or any provision thereof, may be applicable." The prohibition of slavery therein, passed in 1820, thus attached to them as organized Territories. It was very doubtful whether Oregon was really a part of the Louisiana Purchase,<sup>1</sup> and for greater safety an explicit prohibition of slavery was inserted in the first House bill to organize the Territory. In this form the House passed the bill, February 3, 1845, by a vote of 140 to 59. Pending difficulties with Great Britain made the organization of the Territory at that time a matter of doubtful prudence, and it was not considered by the Senate until after the treaty of June 15, 1846.

All parties who voted for the annexation of Texas did so with a silent recognition of slavery therein, as established by local law. But the remainder of the Mexican republic was absolutely barred to slavery, at first by a decree of the dictator Guerrero in 1829, and then by the constitutions of the Mexican republic. If, then, any portion of it should be annexed to the United States, it would come in as free territory, just as all other acquisitions had been slave territory when acquired. Early in the Mexican war an arrangement seems to have been made by the Administration with the banished Mexican President, Santa Anna, by which he was to be allowed to return to Mexico, reorganize his party, and conclude a peace on the basis of a payment by the United States for a cession of territory.

August 8, 1846, in a special message, the President asked for the appropriation of a sum of money for "the

<sup>1</sup> See Northwest Boundary.

adjustment of a boundary with Mexico such as neither republic will hereafter be inclined to disturb," that is, for the purchase of Mexican territory outside of Texas. Such a bill, appropriating \$2,000,000, was at once introduced in the House, and debate was limited to two hours. Northern and Southern Whigs were alike opposed to any acquisition of territory, for fear of introducing with it the question of slavery: and White, of New York, and Winthrop, of Massachusetts, now expressed their party's views clearly and forcibly. Most of the Northern Democrats, while determined on acquisition of territory, were equally determined that it should remain free. Brinckerhoff, of Ohio, at once drafted, and Wilmot introduced, the amendment afterward famous as the "Wilmot Proviso," as follows:

"provided that [as an express and fundamental condition to the acquisition of any territory from the republic of Mexico by the United States, by virtue of any treaty which may be negotiated between them, and to the use by the executive of the moneys herein appropriated] neither slavery nor involuntary servitude shall ever exist in any part of said territory, except for crime, whereof the party shall first be duly convicted."

The words in brackets were not essential, except under temporary circumstances, and the remainder forms the Wilmot Proviso proper, as it is usually cited. It followed the language of the Ordinance of 1787.

Remarkably little opposition was made to this first appearance of the proviso, and that little came from Southern Democrats who alleged that the territory in question was already free; that the proviso was thus needless; and that it was also mischievous, as a piece of supererogatory and offensively anti-Southern legislation, which would provoke the election of extreme Southern representatives and endanger the Union. This view will be found best stated by Benton, as cited below, and he himself was one



of the first victims. The proviso was quietly accepted; the House decided it in order by a vote of 92 to 37, and adopted it (83 to 64) and the whole bill (85 to 79) on the day of its introduction. Two days afterward, on the last day of the session, the Senate voted, 19 to 10, to take up the bill for consideration. Lewis, of Alabama, moved to strike out the proviso. Davis, of Massachusetts, argued against the motion, and persisted in his argument until the time fixed for adjournment came, and he was cut off in the full flow of debate. The proviso thus fell with the bill.

It was claimed at the time that it would have been passed by the votes of all the free-State Senators, and those from Delaware and Maryland; but Wilson makes a very convincing showing that it would have been voted down. Nevertheless, the denunciations of Davis's action in Democratic newspapers and in the *Union*, the official newspaper at Washington, were far more severe than in those of their opponents. Cass, in conversation, censured Davis severely. Polk, in his message of the following December, without any condemnation of the proviso, expressed his regret that the bill had not passed, and his confidence that a majority of both Houses was still in favor of it. The legislatures of every Northern State east of Indiana, excepting Maine, but including Delaware, formally approved the proviso, Democrats and Whigs uniting in the vote. Everything seemed to point to its passage, as a Democratic measure, at the following session.

Before the following session the Southern members had been naturally forced into an attitude of stronger opposition to the proviso. Every Southern aspirant to a seat in Congress was certain to represent the sitting member's active or passive support of the proviso as an act of treason to the South; and thus all the Southern Democrats, who desired an acquisition of territory, were arrayed

against the proviso. Southern Whigs, who were against the acquisition, could safely vote against the proviso with its bill, and could carry enough Northern Whigs with them on that issue to preserve the national integrity of their party. How were Northern Democrats to keep their party intact?

This pressing question was answered by the evolution of the new dogma of "popular sovereignty" (see that title) in the Territories, by virtue of which the status of slavery in any Territory was to be remitted to the decision of the people of the Territory. Urged at first as a prudent way of settling the difficulty, it almost immediately became the touchstone of democracy, and Wilmot and Democrats who supported him were driven out of the party.

January 4, 1847, in the House, Preston King, of New York, asked leave to offer a bill like that of the previous session, changing \$2,000,000 to \$3,000,000, but adding the proviso. Before it could be considered, bills of like nature, but without the proviso, had been reported in both Houses. In the Senate the Southern Whigs unsuccessfully tried to add a prohibition of any purchase of territory; and the bill, without the proviso, passed March 1st. In the House the proviso was moved by Wilmot as an amendment, February 8th, renewed by Hamlin, February 15th, and adopted by a vote of 115 to 106, Douglas unsuccessfully trying to restrict it to territory north of latitude 36° 30'. March 3d, in the House, the proviso was added to the Senate bill in committee of the whole by a vote of 90 to 80, but rejected on the report of the committee (97 to 102); and the bill, without the proviso, was finally passed (115 to 81).

In the meantime, a bill to organize Oregon Territory, with a provision that the inhabitants should enjoy all the privileges, and be bound by all the prohibitions and restrictions, of the Ordinance of 1787 (which prohibited

slavery), was passed by the House, January 16, 1847. But Oregon was now to be linked in, for a time, with the territory to be annexed; and the Senate, after twice committing the bill, laid it on the table, March 3d.

II. AFTER ANNEXATION AND BEFORE COMPROMISE.— Before any further measures could be attempted at the next session, peace had been concluded, February 2, 1848, and the great Territories of California and New Mexico had been transferred to the United States. The fact of possession greatly changed political conditions. Southern Democrats simply continued to oppose the proviso; Northern Democrats now opposed it by force of the doctrine of popular sovereignty; and Southern Whigs, who had opposed it together with the \$3,000,000 bill, on account of the acquisition of territory, found little difficulty in continuing the opposition after annexation. In short, the proviso had now no friends in Congress, excepting a part of the Northern Whigs and the few remaining Wilmot Democrats. Only the imminent presidential election of 1848, and the unknown possibilities of a Northern free-soil uprising, prevented the organization of the Territories, without the proviso, in the spring of 1848; and the lost opportunity was not easily regained.

May 29, 1848, the President called the attention of Congress to the pressing necessity of organizing Oregon Territory; and the necessity was emphasized by the fact that the popular provisional government in Oregon had begun to make laws forbidding slavery. The necessary bill, which Douglas had reported, January 10th, was at once brought up; Hale offered as an amendment a section imposing the prohibitions, as well as the privileges, of the Ordinance of 1787; and debate continued until July 12th. A select committee of eight was then chosen, and it reported, July 18th, a bill in thirty-seven sections, commonly known as the "Clayton compromise," from the chairman of the committee, organizing the Territories

of Oregon, California, and New Mexico together. No power was given to the territorial legislatures to legislate on slavery, and questions of its legality or illegality in any particular Territory were to be decided by the territorial courts, with a right to appeal to the United States Supreme Court. This Corwin opposed as enacting "not a law but a lawsuit."

In this form the bill passed the Senate, July 26th, but the House laid it on the table by a vote of 112 to 97, and it was never revived. The majority was made up of 74 Northern Whigs, 30 Northern Democrats, and 8 Southern Whigs. August 2d, the House passed an Oregon bill, with the section relating to the Ordinance of 1787. August 10th, the Senate passed it with an amendment declaring the Missouri Compromise line to extend to the Pacific and to be binding in all future organizations of Territories; and on the following day the House non-concurred. August 12th, the Senate receded, passed the bill as it originally came from the House, and Oregon was a free Territory. The secret of the Senate's action was in the Buffalo convention three days before, and the nomination of candidates pledged against extension of slavery.<sup>1</sup>

The Southern leaders were doubly embarrassed at the meeting of Congress in December, 1848. The discovery of gold in California, January 19, 1848, was increasing the population so rapidly that a State government would soon be even more necessary than a territorial government; and the mass of Northern Democrats in Congress were so thoroughly provoked by Taylor's election through Southern electoral votes as to be ready even for the proviso. Nothing could have postponed the proviso but the shortness of the session, and the still controlling influence of the South in the Senate. Congress had hardly organized, when the House, December 13th, by a vote of 108

<sup>1</sup> See Free-Soil Party.

to 80, instructed the Committee on Territories to bring in territorial bills for California and New Mexico, "excluding slavery therefrom." The committee, one week later, reported the California bill, but it was not reached until February 26, 1849. The next day it was passed by a vote of 126 to 87, almost exactly sectional. The New Mexico bill was reported January 3d, but was not reached. In the Senate the California bill was referred, but never considered, and the committee was discharged, March 3d. In place of it, an unsuccessful attempt was made to tack a Senate bill to the appropriation bill. At the adjournment the Territories were still left unorganized.

No one, as yet, denied the right of the people of a Territory, when forming a State constitution, to prohibit slavery; and the new Administration (Taylor's) at once undertook to solve the problem by procuring the formation of State governments in both California and New Mexico. In both of these the Wilmot Proviso was a part of the State constitution. This forced the further proceedings into a new line, which is detailed elsewhere.<sup>1</sup>

In reviewing the whole current of events, at the close of September, 1850, it will appear that the object of the proviso, the prohibition of slavery, had been successfully attained in all the territory outside of the Louisiana Purchase, except the modern State of Nevada, and the Territories of Utah, New Mexico, and Arizona (then included in New Mexico); and that, as to the excepted portions, the Mexican laws abolishing slavery therein had never been interfered with by American laws. But the struggle over the Wilmot Proviso, which was essentially only a declaration of the existing law of the Territories, was a very sufficient warning that some influence was at work which would resist any such declaration for the future. This was the doctrine of Calhoun, that the Constitution's guarantee of security to property covered the

<sup>1</sup> See Compromises, V.

Territories also; and that Congress was bound to enforce it in the case of slave property, as well as other property. The objection now seems insuperable that the slaves were always referred to as "persons" in the Federal Constitution, and as "property" only in State constitutions and laws, which could have nothing to do with the Territories. But at the time Calhoun's doctrine fell in too closely with Southern feeling to be resisted. It was adopted, openly by some, tacitly by others, and the comparative strength of the former class steadily increased. Calhoun's resolutions of February 19, 1847, protesting against discrimination in the Territories against any State, were the first, though vague, expression of the doctrine, and their effect was seen in the unanimous resolutions of the Virginia Legislature, March 8th, following: 1, that such a discrimination was in violation of the compromises of the Constitution; 2, that it was to be "resisted at every hazard"; and 3, that, in the event of the passage of the Wilmot Proviso or any law abolishing slavery or the slave trade in the District of Columbia, the governor should immediately convene the Legislature "to consider of the mode and measure of redress." As the proviso discussion went on, the Southern tone grew still warmer; and at the time of the final compromise most of the Southern States had statutes or resolutions in existence directing the governor to call a popular convention in the event of the passage of the proviso.<sup>1</sup>

In this period (1846-50) the discussions over the organization of Oregon are very important. The student should read the speeches of Rhett, Calhoun, and Webster. Since the South had obtained Texas it was not thought that any contention would arise as to the free status of Oregon, and resistance to the free organization of that Territory arose only as a means of enforcing concessions

<sup>1</sup> See Secession, II.

elsewhere, or because of the principle involved which the South was not willing to surrender. When the Wilmot Proviso was proposed for Oregon, Burt, of South Carolina, proposed an amendatory clause, "inasmuch as said Territory is north of  $36^{\circ} 30'$ ." The purpose of this was to secure a public legal declaration of the right to introduce slavery south of this line. Northern votes rejected the Burt amendment, which was equivalent to notice that resistance would be offered to the extension of slavery into any national territory. Webster sets forth the principle of the Wilmot Proviso, August 12, 1848:

"Gentlemen say we deprive them of participation in Territories acquired by common service and common exertions. How deprive? Of what do we deprive them? Of the privilege of carrying their slaves to the new Territory. They say we deprive them of the privilege of going into this Territory with their 'property.' What do they mean by 'property'? We certainly do not deprive them of the privilege of going into these new Territories with all that in the general estimate of human society, in the general and common and universal estimate of mankind, is esteemed property. They have in their States peculiar laws which create property in persons, while everybody agrees that it is against natural law. They mean, then, that they cannot go into the Territories of the United States carrying their own peculiar local law which creates property in persons. This is all the ground of complaint they have. The demand of the South goes upon the idea that there is an inequality unless persons under this local law, holding property by authority of that law, can go into new territory and there establish that local law to the exclusion of the general law. All the Southern people may go into the new territory. The only restraint is they may not carry slaves there and continue the relation. They say this shuts them out altogether. There can be nothing more inaccurate in point of fact than this statement. Who settled Illinois? Who settled Indiana? Immigrants from Kentucky, Virginia, Tennessee,

and the Carolinas, equally and with equal privileges with all other sections."

Calhoun in the Senate, and Rhett, of South Carolina, in the House, set forth ably the Southern position on the rights of slavery in the Territories. They held it to be within the power and duty of the General Government to protect slavery there. The Territories belonged to the States united. The States were the joint owners, co-sovereigns in the Territories; the General Government was only the agent of the States in the Territories. Its power "to dispose of and make all needful rules and regulations respecting the territory and other property of the United States" did not involve the right to decide what should be property there. "The ingress of a citizen is the ingress of his sovereign, that is, his State, who is bound to protect him in his settlement." Rhett disclaimed the doctrine that each State should set up a government in the Territory over its citizens immigrating into them; he meant only that the citizens of each State should have equal right to enter the Territories and settle with their property,—with whatever was recognized as property by their respective States. The General Government must execute in the Territories the laws of each State defining and protecting property; it must recognize and protect as property anything which was so recognized and protected by any State in the Union. This meant the legal protection of slavery in every Territory of the Union. Professor Burgess says, "this was a new doctrine in 1847 and marks the progress toward confederation and dissolution."<sup>1</sup>

As to what law touching slavery prevailed in the Mexican cessions from 1848 to 1850, Calhoun contended that, immediately the treaty was made, the Constitution superseded the laws of Mexico in the transferred

<sup>1</sup> *Middle Period*, 342-3.



territory and legalized and protected slavery there. Benton called this Calhoun's "dogma of the transmigratory function of the Constitution, and the instantaneous transportation of itself in its slavery attributes into all acquired territories." On the proposal to recognize the continuance of the status of military possession and the operation of the Mexican laws in the acquired territory (which prohibited slavery) Senator Berrien of Georgia contended that only the private law of the ceding country, the law regulating the relations between individuals, remains in force in the territory ceded, until changed by the positive legislation of the country receiving the cession; that the public law of the receiving country is extended at once, by virtue of the occupation, over the cession; that slavery was a part of the public law of the United States, since both the system of taxation and that of representation rested upon it. Therefore, without action by Congress, according to Berrien, the President should continue to execute the private law of Mexico and the public law of the United States in the new cessions. The pro-slavery forces in Congress did not wish the positive recognition by Congress of the Mexican laws for the Territories, but rather that the applicable parts of the Constitution should be recognized as extending there, which, according to the Southern view, would protect slavery. Neither of these things was done, and the Thirtieth Congress expired without doing anything for the governmental organization of California and New Mexico.

This discussion brought out and left pending five distinct proposals for the settlement of the problem of slavery in the Territories.

1. The Southern Calhoun-Rhett doctrine: National protection of slavery in the Territories. The Constitution is a pro-slavery instrument and recognizes and protects property in slaves. Neither Congress, nor the

inhabitants of a Territory, nor a territorial legislature can exclude slavery from a Territory.

2. The doctrine of the Wilmot Proviso, directly opposed to the Southern principle,—that slavery should be prohibited in the Territories by national authority.

3. The principle of popular sovereignty,—leaving the question of slavery in the Territories to the settlers there.

4. The extension of the Missouri Compromise line to the Pacific.

5. The Clayton compromise, proposing to leave the status of slavery in the Territories to be settled by judicial process, in the territorial courts, with right of appeal to the Supreme Court of the United States.

None of these proposals for settling the territorial question in relation to slavery was agreed upon, and thus a situation was left open which led to the famous compromise measures of 1850.—ED.

III. AFTER THE COMPROMISE.—The general ratification of the compromise of 1850 seemed at first to have put an end to the desire for the proviso. When was it to be applied? California was a free State, and the Territories had been completely organized, those acquired under the Louisiana Purchase having the proviso under the Missouri Compromise, and those acquired under the Mexican purchase merely ignoring it.

Not content to let well enough alone, the Northern Democratic leaders, in 1854, attempted to apply the “popular sovereignty” principle to the new Territories of Kansas and Nebraska, formed from the Louisiana Purchase,<sup>1</sup> and thus to wipe out the proviso when it was already established by law. The attempt naturally revived the proviso on a far stronger ground. It was now an evidently conservative effort to reapply to the Louisiana Purchase the prohibition which had been its organic

<sup>1</sup> See Kansas-Nebraska Bill.

law from 1820 until 1854; and it thus secured a breadth of support greater than it could have obtained in 1849-50, and became the basis of a great Northern party.<sup>1</sup> But of course the new party could not be content to limit the assertion of the proviso to the Louisiana Purchase: law for one Territory was law for all, for Utah and New Mexico as well as for Kansas and Nebraska; and thus the work of 1850 was to be done over again, with no chance now for compromise.

In 1857 the Supreme Court decided that the proviso had always been unconstitutional in the case of any Territory<sup>2</sup>; but this had little effect on the supporters of the proviso. They still asserted the right of Congress to impose a prohibition of slavery upon the Territories, disregarding the *obiter dicta* of the Supreme Court, and leaving the constitutional question to be decided by the Court when the case should come directly before it. Against this permanent programme a bald negative was but a poor reliance: the South was compelled to choose between admitting the validity of a prospective prohibition, or taking Calhoun's extreme ground of the duty of Congress to protect slavery in the Territories.

It chose the latter,<sup>3</sup> its ultimatum being expressed in Jefferson Davis's Senate resolutions of May 24-25, 1860. The most important of these, in this connection, were the fourth and fifth, as follows:

"4, that neither Congress nor a territorial legislature, whether by direct legislation or legislation of an indirect and unfriendly character, possesses power to annul or impair the constitutional right of any citizen of the United States to take his slave property into the common Territories, and there hold and enjoy the same while the territorial condition remains; 5, that, if experience should at any time prove that the judicial

<sup>1</sup> See Republican Party, I.

<sup>2</sup> See Dred Scott Case.

<sup>3</sup> See Democratic Party, V.

and executive authority do not possess means to insure adequate protection to constitutional rights in a Territory, and if the territorial government should fail or refuse to provide the necessary remedies for that purpose, it will be the duty of Congress to supply such deficiency."

At least a part of these resolutions was explained by a territorial law of New Mexico, in 1859, establishing slavery. It was disapproved by the House of Representatives, but the Senate did not act on the veto bill, so that the territorial slave law remained in force. On the contrary, the eighth resolution of the Republican platform in May, 1860, declared

"that the normal condition of all the territory of the United States is that of freedom; that, as our republican fathers, when they had abolished slavery in all our national territory, ordained that no person should be deprived of life, liberty, or property without due process of law, it becomes our duty, by legislation, whenever such legislation is necessary, to maintain this provision of the Constitution against all attempts to violate it; and we deny the authority of Congress, of a territorial legislature, or of any individuals, to give legal existence to slavery in any Territory of the United States."

The issue was thus fairly made up on both sides: all or nothing. The Republican programme was indorsed by Lincoln's election, and secession and war followed.<sup>1</sup>

IV. FINAL ESTABLISHMENT OF THE PROVISO.—The withdrawal of Southern Senators and Representatives left the Republicans in a majority in both Houses of Congress before the end of the session of 1860-61; but they made no attempt to enforce the eighth section of the Chicago platform. The propositions of Crittenden,<sup>2</sup> and of the peace congress,<sup>3</sup> both of which aimed to forbid

<sup>1</sup> See Secession, III.; Rebellion.

<sup>2</sup> See Compromises, VI.

<sup>3</sup> See Conference, Peace.

the future application of the Wilmot Proviso to territory south of latitude  $36^{\circ} 30'$ , were rejected; but, on the other hand, the Territories of Colorado, Dakota, and Nevada were organized without the Wilmot Proviso, in entire silence as to slavery, and therefore with all the benefits to the South of the Dred Scott decision. Slavery in the Territories remained undisturbed until 1862, immediately after its abolition in the District of Columbia, April 16th.<sup>1</sup>

In the House, March 24th, a bill was introduced "to render freedom national, and slavery sectional," and was referred to the Committee on Territories. It was reported, May 1st, recommitted, and again reported, May 8th. It was now a bill to prohibit slavery in the Territories, in Federal forts, dockyards, etc., in vessels on the high seas, in national highways, and in all places where the National Government had exclusive jurisdiction. It was debated until May 12th, when it had been modified into a simple prohibition of slavery in the Territories, and was then passed by a vote of 85 to 50. In the Senate, June 9th, its language was slightly changed to the following:

"that, from and after the passage of this act, there shall be neither slavery nor involuntary servitude in any of the Territories of the United States now existing, or which may at any time hereafter be formed or acquired by the United States, otherwise than in punishment of crime, whereof the party shall have been duly convicted";

and it was then passed (28 to 10). June 17th, the House concurred (72 to 38); and the bill became law, June 19th. It was never brought before the Supreme Court, in order that its constitutionality might be examined in the light of the yet unreversed Dred Scott decision; but all doubts

<sup>1</sup> See Abolition, III.

on that score were removed by the national abolition of slavery in 1865, through the ratification of the Thirteenth Amendment.<sup>1</sup>

See 3 Von Holst's *United States*, 286; 1 Greeley's *American Conflict*, 189; 2 Wilson's *Rise and Fall of the Slave Power*, 18; Harris's *Political Conflict in America*, 114; 2 A. H. Stephens's *War Between the States*, 165; *Buchanan's Administration*, 18; 1 Dix's *Speeches*, 179 (Three Million Bill); Gardiner's *The Great Issue*, 94; 16 Benton's *Debates of Congress*, 223-254 (Oregon), 399 (summary of Mexican laws abolishing slavery); Cleveland's *A. H. Stephens*, 343 (and law authorities there cited in favor of the continuance of Mexican laws after conquest); 3 *Stateman's Manual*, 1613 (Message of August 8, 1846), 1710 (Message of May 29, 1848); 15 Benton's *Debates of Congress*, 645 (introduction of the proviso); 16 *ibid.*, index under *Slavery*; 4 Calhoun's *Works*, 339 (resolutions of February 19, 1847); 1 A. H. Stephens's *War Between the States*, 409 (Senate resolutions of May 24-25, 1860); 12 *Stat. at Large*, 432 (act of June 19, 1862); Wilson's *Anti-Slavery Measures in Congress*, 92. The different shades of opinion as to the proviso may best be studied as follows: moderate Democratic (South), 2 Benton's *Thirty Years' View*, 695 (North), 1 Dix's *Speeches*, 281; extreme Southern Democratic, 4 Calhoun's *Works*, 535 (Speech of February 24, 1849); Southern Whig, Cleveland's *A. H. Stephens*, 332 (Speech of February 12, 1847); Northern Whig, 5 Webster's *Works*, 253 (Speech of March 1, 1847); free-soil, Horace Mann's *Letters and Speeches*, 10 (Speech of June 30, 1848); abolitionist, Jay's *Review of the Mexican War*, 183, and Warden's *Life of Chase*, 314; administration, 1849-50, 3 *Statesman's Manual*, 1847 (Message of January 21, 1850); Hart's *Life of Chase*; Bancroft's *Life of*

<sup>1</sup> See Constitution, III.

*Seward*; Schouler's *Hist. of U. S.*; Von Holst's, *United States*; Burgess's *Middle Period*; Julian's *Life of Giddings*; McLaughlin's *Cass*; Stanwood's *Presidency*; Schurz's *Clay*; Wise's *Seven Decades*. The *Democratic Review* carefully avoids the subject until September, 1847 (p. 103), and the *Whig Review* until August, 1848 (p. 193), and then both pronounce against the proviso, the former as an abolition measure, the latter as a democratic measure.

## CHAPTER V

### COMPROMISES IN AMERICAN HISTORY

**COMPROMISES OF THE CONSTITUTION.**—No census had been taken in America when the convention of 1787 met, but its debates were based on the following estimates of population, which the census of 1790 showed to be fair approximations: 1, Virginia, 420,000; 2, Massachusetts, 360,000; 3, Pennsylvania, 360,000; 4, New York, 238,000; 5, Maryland, 218,000; 6, Connecticut, 202,000; 7, North Carolina, 200,000; 8, South Carolina, 150,000; 9, New Jersey, 138,000; 10, New Hampshire, 102,000; 11, Georgia, 90,000; 12, Rhode Island, 58,000; 13, Delaware, 37,000. In the five Southern States the entire population was slightly larger, only three fifths of the slaves being included in the above list. Of the thirteen States New Hampshire was not represented in convention until July 23, 1787, and Rhode Island not at all. Of the remaining eleven States, a "large State" majority and a "small State" minority were formed almost from the convention's first meeting, the large States being Virginia, Massachusetts, Pennsylvania, North Carolina, South Carolina, and Georgia, and the small States, New York, Maryland, Connecticut, New Jersey, and Delaware. However greatly the votes varied on minor points, on the great and essential question of a national or a federative form for the new government, the vote was usually six to five as above given.

Had the two parts been strictly "large" against "small"



States, according to the population above given, of course the vote would have stood three to eight; but North Carolina, South Carolina, and Georgia, either from ambitious hopes of the future growth of their vast western territory, or from a desire to gratify the larger States and draw them into a union which should afford effective national protection against the Southern Indians, habitually voted with the larger States, and made them a majority, since each State was entitled to one vote in the convention. Between the two parts of the convention the main question at issue was, whether the new government should be one in which each State's influence should be proportioned to its population, or one in which each State, however small, should have an influence equal to that of any other State, as under the Confederacy. The large States naturally preferred the former, or "national" system, and the small States the latter, or "federative" system.

May 29th, Edmund Randolph, of Virginia, offered the "Virginia plan,"<sup>1</sup> which formulated the demands of the large State majority. It consisted of fifteen resolutions, whose main features were, that Congress should consist of two branches, the representation in *both* based on population, that the Representatives should be chosen by the people, the Senate by the Representatives, and the President by the Senate and Representatives together. The Senate would have had twenty-eight members, as follows: Virginia, 5; Pennsylvania and Massachusetts, 4 each; South Carolina, North Carolina, Maryland, New York, and Connecticut, 2 each, and the other States, 1 each. The three large States would thus have had nearly one half (26 out of 65) of the House of Representatives and nearly one half of the Senate, and, if united, could have controlled the appointment of the President and the policy of the Union.

<sup>1</sup> See Convention of 1787.

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June 13th, the committee of the whole reported the "Virginia plan" to the convention. June 15th, Patterson, of New Jersey, offered the "Jersey plan," the ultimatum of the smaller States. It consisted of eleven resolutions, mainly intended to retain and amend the Articles of Confederation, to retain the Congress of a single house and the equal vote of each State in Congress, to give Congress the powers of raising a revenue, of controlling commerce, of coercing any State which should refuse to pay its quota or obey the laws, and of electing an executive. June 19th, the committee of the whole reported adversely to the "Jersey plan," and again in favor of the "Virginia plan."

Two plans had thus been proposed, whose terms in almost every point were entirely incompatible. Before the rejection of the Jersey plan, Dickinson, of Delaware, had proposed to consolidate the two plans, if possible; and, June 21st, Johnson, of Connecticut, had touched the vital point by proposing to give the States an equal representation in the Senate and a proportionate representation in the House. This proposal of a compromise he repeated and emphasized, June 29th; and on the same day, Ellsworth, of Connecticut, formally moved that such provision be made. July 2d, the motion was put, and lost by five small States to five large States, and one (Georgia) divided.

The convention had now "got to a point where it could not move one way or the other," and the whole business was referred to a select committee of one from each State. This committee, July 5th, reported Ellsworth's compromise, with two additional features: the House, where the larger States were expected to control, was to originate money bills, and three fifths of the slaves were to be included in the population as ascertained for representation. The first proposal was intended to placate the large States in general, and the second to

secure the votes of North Carolina, South Carolina, and Georgia.

At first the compromise hardly found a favoring voice in the convention. The committee was declared to have exceeded its powers, and so moderate a delegate as Madison "only restrained himself from animadverting on the report, from the respect he bore to the members of the committee." Nevertheless, as step by step its items were brought up for debate and decision, the whole was adopted and became an integral part of the Constitution, with the addition of the power given to the Senate to propose amendments to money bills. The Senate, therefore, whose conception has received warmer admiration than that of any other feature in the Constitution, owes its present form entirely to an unwilling compromise of the conflicting demands of the large and the small States.

One of the incurable evils of the Confederacy was that the States which had formed it, after withholding from Congress any power to control commerce, had provided that their articles of association should only be amended by a unanimous vote. The commerce of the country was therefore the commerce of thirteen separate States, each of which could levy any duties it saw fit upon exports or imports, provided it did not interfere with existing treaties, or touch the property of the United States or of any other State.

The State of New Jersey, before ratifying the Articles of Confederation, had warmly objected to this feature, as one which might involve "many difficulties and embarrassments," and most of the delegates from the commercial States had entered the convention with an intention to give the new Federal Government this essential and absolute power of controlling commerce. Against this intention the delegates from other States were not disposed to array themselves, except upon one

point. In several of the States a single article made up the mass of the exportation, as was the case in South Carolina with rice, in North Carolina with ship stores, and in Virginia and Maryland with tobacco. Should the new Federal Government be given the power to lay export duties on these a hostile majority in Congress might easily cripple or annihilate the whole wealth of a State at one blow. Before the question came to be considered, C. C. Pinckney, of South Carolina, had twice given notice that his State would not enter the new Union unless the power to tax exports was withheld.

The Virginia plan, as originally offered, made no direct reference to commerce, but only proposed that Congress should be empowered "to legislate in all cases to which the separate States are incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation." Chas. Pinckney's plan, which was introduced also May 29th, and whose "Powers of Congress" are very closely followed in the Constitution, as finally adopted, distinctly proposed to give Congress the power "to regulate commerce with all nations, and among the several States." But neither these plans, nor that of Hamilton, offered June 18th, contained any restriction on the power of Congress to tax exports: this first appears in the draft of the Constitution as reported August 6th, in the words, "No tax or duty shall be laid by the legislature on articles exported from any State." With the omission of the words "by the legislature" this was adopted, August 21st, by a vote of seven States (Massachusetts, Connecticut, Maryland, Virginia, North Carolina, South Carolina, Georgia) to four (New Hampshire, New Jersey, Pennsylvania, Delaware). New York's delegates, with the exception of Hamilton, had already left the convention because of the success of the first compromise. By this, the second, compromise, Congress was given complete control over

national or inter-State commerce, with the exception of a restriction upon its power to tax exports.

In consideration of this grant of power to Congress, and as a make-weight to the Southern agricultural States, it was provided that the foreign slave trade should not be interfered with for twenty years. Two days following the grant to Congress of power to regulate commerce, a stormy debate arose on the question of the slave trade, ending in an emphatic refusal by Georgia, South Carolina, and North Carolina to enter the new Union unless its Congress should be forbidden to prohibit this traffic, or to tax it more highly than the trade in other imports. Here again the convention was brought to a standstill, and again the whole question was referred to a select committee, which reported the second part of this great compromise of the Constitution. It consisted in forbidding Congress to prohibit the importation of slaves, when allowed by State laws, before 1808, but permitting the imposition of a tax of \$10 per head on such importations. The slave trade was thus brought at once under the revenue power of Congress, and, within twenty years thereafter, under its commercial power also.

As a make-weight for the Northern States, a provision in the draft of August 6th, that "No navigation act shall be passed without the assent of two thirds of the members present in either House," was stricken out, thus giving to a congressional majority complete control over commerce; and, as a make-weight for the Southern States, it seems (from C. C. Pinckney's language to the South Carolina convention) to have been a general understanding, though not a part of the compromise committee's report, that provision would be made for a fugitive slave law. That part of the report relating to the slave trade was adopted by a vote of seven States to four, Virginia, Delaware, Pennsylvania, and New Jersey voting in the negative. The rest of the report, and the pro-

vision for a fugitive slave law a few days after, were adopted without any opposition.<sup>1</sup>

The third compromise in the convention, the second in which slavery was involved, is known as the "three-fifths compromise." This was the most important compromise of the convention touching slavery and the one which afterwards created much controversy and dissatisfaction in the Northern and Eastern States. It was the result of the controversy in the convention—a continuation of the controversy at the formation and during the history of the Confederation—in relation to the method of apportioning taxes and representatives among the States. Having decided that representation should be allotted to the States according to some equitable proportion, the question then arose whether this should be according to wealth or according to population. Having decided that the allotment should be according to population, the question arose whether any or all of the blacks should be counted. In settling this the convention fell back to a precedent of the Confederation,—an amendment proposed by Congress to the Articles of Confederation, April 18, 1783, known as the Revenue Amendment. When the Articles of Confederation were adopted, from lack of information to justify a better plan, it was agreed that requisitions for expenses (taxes) should be assessed to the various States in proportion to the

<sup>1</sup> The fugitive slave clause of the Constitution was not a part of any compromise. It was inserted without much discussion or serious opposition, at a late stage of the conventions proceedings. The usual statement in the political literature preceding the Civil War that this clause was essential to the adoption of the Constitution and was a part of the mutual agreement necessary to the union of the States, although accepted and repeated by many recent writers, may be rejected as not well founded. The inquiry whether the fugitive slave clause was essential to the adoption of the Constitution is a good subject for historical criticism. See Sumner's speech on the Fugitive Slave Law, Aug. 26, 1852.—ED.

value of their lands. This was never satisfactory, and early and frequent attempts were made to change this basis of requisitions. On April 18, 1783, Congress finally recommended to the States a revenue scheme by which it was provided that

“all charges of war and all other expenses that have been or shall be incurred for the common defence or general welfare shall be defrayed out of a common treasury which shall be supplied by the several States in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years and *three fifths of all* other persons, except Indians not paying taxes in each State.”

This was agreed to in the Congress of the Confederation and ratified by all the States, save one, when submitted to them. It was then a question of allotting taxes. It was a maxim of the Revolution that taxation and representation should go together, and therefore when in the convention of 1787 the members were attempting to settle the basis of representation, the precedent of 1783 was deferred to. Wilson

“observed that less umbrage would perhaps be taken against an admission of the slaves into the rule of representation if it should be so expressed as to make them only indirectly an ingredient in the rule, by saying that they should enter into the rule of taxation; and as representation was to be according to taxation, the end would be equally attained.”<sup>1</sup>

When it was a question of taxation the North wished that all of the blacks should be counted, while the South would exclude them all. When it was a question of representation, the tables were turned,—the South wished to count all the blacks, the North, none. The three-fifths

<sup>1</sup> Madison's *Journal*, July 12th.

compromise seemed the best and most feasible adjustment and it was agreed in the Constitution, in almost the identical language of the Revenue Amendment of 1783, that

“representatives and direct taxes shall be apportioned among the several States according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a number of years and excluding Indians not taxed, three-fifths of all other persons.”<sup>1</sup>

This concession in representation, which allowed political power to the South for a species of its property, was made to the then existing slave States as a means of securing the Union. Upon the extension of slavery and the admission of new slave States, this compromise became the basis of opposition on the part of Northern States. This opposition was largely political in motive, as is seen by the proposal of the Hartford Convention in 1814 to amend the Constitution by rescinding this compromise. At various other times Northern statesmen expressed their dissatisfaction with this adjustment, and this concession of political power for slave property became one of the principal factors in arousing opposition to slavery extension.—ED.<sup>2</sup>

No part of the Constitution has been more warmly condemned than the two “compromises of a moral question.”

Those who so regard them forget that to the members of the convention slavery was not a moral question at all; that in but two Northern States, Massachusetts and New Hampshire, unless we include the *quasi* independent republic of Vermont,<sup>3</sup> had public opinion advanced so far

<sup>1</sup> Const., Art. I., Sec. 2.

<sup>2</sup> See Hartford Convention, Missouri Compromise, <sup>3</sup> See Abolition, I.



as to abolish slavery entirely; and that the erection of two or more separate nations on this continent, with their certain attendants of standing armies and international wars, was an evil which it was the convention's imperative duty to avoid. If the whole future history of the country, even through and including the War of the Rebellion, had been laid open to the view of the convention, its present and pressing duty would still have been to make the compromises as cheaply as possible, to make South Carolina, North Carolina, and Georgia permanent members of a union, and then to leave the question of slavery to the decision of events.

It seems beyond question that, without the two compromises just given, the formation of a single national government for the territory between the Canadas and Mexico, the Atlantic and the Pacific, would have been an impossibility; that two or more, probably three, confederacies would at once have been evolved; and that the present republic would never have existed even in imagination.

**MISSOURI COMPROMISE.**—The question of slavery was at first of only incidental interest in the political history of the country. The convention of 1787, whose work and plans were mainly confined to the fringe of States along the Atlantic coast, had really joined two nations, a slaveholding nation and one which only tolerated slavery, into one; but the union was physical, rather than chemical, and the two sections retained distinct interests, feelings, and peculiarities. As both spread beyond the Alleghanies to the west, the broad river Ohio lay in waiting to be the natural boundary between the States in which slavery should be legal and those in which it should be illegal. When the tide of emigration began to pour across the Mississippi and fill the Louisiana Purchase, the dividing line was lost and conflict became inevitable.

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The Territory of Missouri, formerly the district of Louisiana, was organized by various acts of Congress, 1812-19. Slavery had been legal by French and Spanish law before the annexation, had been continued by the laws of the Territories of Louisiana and Missouri, and had not been prohibited by any of the organizing acts of Congress. The Territory was therefore in the straight road to become a slave State, as Louisiana had already become. March 16, 1818, a petition from Missouri for permission to form a State constitution was offered in the House, and April 3d a committee reported an enabling act, which slept until the following session.

February 13, 1819, the House went into committee of the whole upon the enabling act, when Tallmadge, of New York, offered the following amendment to it:

*“And provided, also, That the further introduction of slavery or involuntary servitude be prohibited, except for the punishment of crimes whereof the party shall be duly convicted; and that all children of slaves, born within the said State after the admission thereof into the Union, shall be free, but may be held to service until the age of twenty-five years.”*

The Tallmadge proviso was added to the bill by an almost exactly sectional vote, the Northern members voting for it and the Southern members against it. The bill then passed the House. In the Senate it was amended by striking out the proviso, but the House refused to concur in the amendment, and in the resulting disagreement the bill was lost. At the close of this Congress, March 3, 1819, Missouri was therefore still a Territory.

The Tallmadge proviso, in the eyes of most of the Northern politicians who supported it, was merely an attempt to maintain the balance of power between the two sections. Kentucky had been offset by Vermont, Tennessee by Ohio, Louisiana by Indiana, and Mississippi

by Illinois. The Territory of Alabama had applied for authorization to form a State government, which, indeed, was granted at this session; and the Tallmadge proviso was a demand that Missouri, as a free State, should now offset Alabama.

Accordingly, before the meeting of the next Congress, the legislatures of Delaware and all the Northern States (except those of New England, whose unpopularity as Federalists would have made their open support of doubtful value, and Illinois, whose early settlers were largely Southern) had warmly approved the Tallmadge proviso, and stamped it as emphatically a Northern measure. In most of the legislatures the vote was unanimous, former party lines being entirely dropped. But, inextricably complicated with this sectional question, there were very many other fundamental questions, so that a full discussion of the Missouri case would almost involve a treatise on American constitutional law.

1. Even granting that Congress had the power to govern the *Territory* of Missouri absolutely, what power was there in Congress to forever prohibit the future *State* of Missouri from permitting slavery within its own limits if by its own laws it should see fit to do so? While other States enjoyed the privilege of permitting or abolishing slavery at their discretion, was Missouri, while nominally entering the Union on equal terms with the other States, to be debarred the right of choice? On the other hand, if Congress had the power to legislate for the Territory, what power could prevent Congress from controlling and laying conditions upon the organization of the Territory into a State? What right had Missouri to object to the absolute prohibition of slavery to which Ohio, Indiana, and Illinois had submitted without a thought of complaint or objection?

2. The treaty by which Louisiana, including Missouri,

<sup>1</sup> See Ordinance of 1787.

had been acquired stipulated that the ceded territory should be at once incorporated into the Union and that its inhabitants should be given *all* the rights of citizens of the United States as soon as possible, and in the meantime be protected in all their rights of "property." From this clause it was argued that any attempt to impose any such limitation upon the admission of Missouri was a breach of good faith and of treaty obligations. To this it was answered that the contracting powers to the treaty must have been aware that the treaty power could not in any way control the admission of new States, which must be by concurrent action of both branches of Congress and the President.

3. A broader ground was taken by some Southern members. They held that the compromise which gave the slave States representation for three fifths of the slave population<sup>1</sup> had recognized slavery as a fundamental feature of their society; that the control of slavery was therefore one of the powers reserved to the States; and that Congress could not constitutionally assume that power in the case of either a new or an old State.

On the other hand, if this were really a compromise by which certain States were to be brought into the Union, why should Missouri now claim as a right that which had been originally granted only to a different and distinctly marked territory? Was it not enough that the Southern States which were included in the bargain had received their stipulated fictitious representation for slave population, but must the same advantage be given to an indefinite number of new States in the future? The above comprises, very briefly, the main arguments for and against the admission of Missouri as a slave State.

A deeper feeling was at work among the people of the North, and is apparent in the speeches of some of the Northern members, though not often referred to openly.

<sup>1</sup> See pp. 107, 108.

Slavery, as an institution, seemed moribund everywhere in 1789, and could be safely left, it was imagined, to the process of gradual abolition in the several States.<sup>1</sup> In the following thirty years it had really died in all the Northern States, though it was not yet quite buried in some of them: in the South it had grown stronger, instead of weaker. Its hands had reached across the Mississippi into territory to which it had no title by the organic law on any interpretation. It had seized Louisiana, had organized Arkansas as a slave Territory, and was now grasping after a new State, with the prospect of obtaining others in the near future, since the newly organized Territory of Arkansas comprised the rest of the Louisiana Purchase.

Here was the place to make the final stand, to demonstrate that, even though a slaveholding population might settle a Territory, its admission as a State was within the control of Congress, and it must enter as a free State or not at all. Only one answer to this was attempted. Clay appealed to the Northern members, as friends of the negroes, to allow them also the benefits of migration to the fat and fertile West, and not to coop them up in the starved lands of the older States; it seems not to have occurred to him that these Territories, if left free, were the nearest and best location for the colonization society.<sup>2</sup>

A new Congress (the sixteenth) met December 6, 1819. Alabama was at once admitted as a State, December 14th, and the number of free and slave States was thus equalized. Missouri, through her territorial legislature, again demanded admission as a State. Maine, whose Democratic majority wished to separate from Federalist Massachusetts, had already formed a State constitution and now applied for admission also. The Maine bill passed the House, January 3, 1820. In the Senate, after a

<sup>1</sup> See Abolition, I.

<sup>2</sup> See Slavery ; Abolition, I.

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month's debate, January 16th to February 16th, the Maine bill was also passed, but with a "rider," consisting of the Missouri bill without restriction of slavery.

This attempt to compel the House to accept the Missouri slave State bill, or lose both, was passed by a vote of 23 (including 3 from the North) to 21. February 17th, Thomas, of Illinois (pro-Southern), offered as an amendment to the bill the compromise afterward adopted, which had been suggested in February, 1819, by McLane, of Delaware, and which consisted, in effect, of a division of the Louisiana Purchase between the free States and the slave States; and the Senate adopted the Thomas amendment by a vote of 34 to 10. Although the affirmative vote in this instance contained the votes of most of the Northern Senators, this was not the first symptom of weakening in the Northern vote; the organization of Arkansas as a slave Territory had already shown that the slavery restrictionists had not learned the rule of *obsta principiis*, without which they could make no successful constitutional fight.<sup>1</sup> The Southern vote was better disciplined and had never wavered.

The Senate passed the bill, with the Thomas amendment, by a vote of 24 to 20.

February 18th, the House disagreed to the Senate bill as amended, the Thomas amendment having only 18 votes to 159. Both Houses, by strong votes, adhered to their position, and the Senate asked and was granted a conference committee, which reported (1) that the Senate should give up its union of the Maine and Missouri bills; (2) that the House should give up the Tallmadge proviso; and (3) that both Houses should unite in admitting Missouri, with the Thomas amendment, as follows:

*"And be it further enacted, That in all that territory ceded by France to the United States, under the name of Louisiana,*

<sup>1</sup> See Democratic Party, III., V.

which lies north of 36 degrees 30 minutes north latitude, excepting only such part thereof as is included within the limits of the State contemplated by this act, slavery and involuntary servitude, otherwise than in the punishment of crime, whereof the party shall have been duly convicted, shall be and is hereby forever prohibited."

A proviso for securing the return of fugitive slaves from the Territory in general was added.

The whole compromise was then passed by the House, the second part of it by a vote of 90 (76 from the South, 14 from the North) to 87, and the third part by 134 to 42, 35 of the nays being ultra-Southern members, who refused to approve any interference by Congress with slavery in the Territories.

The approval of the President was still necessary to make the bills law, and Monroe demanded the opinions of his Cabinet on the questions (1) whether the prohibition of slavery was constitutional; and (2) whether the word *forever* was a territorial "forever," or applicable also to States formed from the Territory in future. The Cabinet was unanimously in the affirmative on the first question, but divided on the second; but by an adroit suggestion of Calhoun the two questions were joined into one—Was the Thomas amendment constitutional? To this every member promptly responded in the affirmative, and the bill was signed March 6, 1820.

The Missouri Compromise of 1820, of which Thomas, of Illinois, was the father, and Henry Clay, of Kentucky, the active, zealous, and successful sponsor, was thus completed in all its parts. At first sight it seems unfair, if any arrangement, with which both parties to a controversy are content, can be called unfair. In a Territory acquired by national action without the consent of its inhabitants, and therefore under national control, it is impossible to make out a case for the establishment of

slavery, any more than of a territorial church, without the express action of Congress; but the South, by persistently claiming this right as to the whole of the Louisiana Purchase, had successfully established it as to a large, and the only present useful part of it.

There is, however, another view of the matter to which attention must be directed. For nearly twenty years Congress had utterly neglected to assert or enforce its power over slavery in the Territories. It had shut its eyes to the existence of slavery in the Louisiana Purchase; it had admitted Louisiana as a slave State; it had allowed the territorial legislatures to legislate in favor of slavery; so late as 1819 it had organized the Territory of Arkansas without restriction of slavery; and those who had brought slavery into the Territories might, with considerable show of fairness, claim that Congress had now no right to suddenly assert a power over their property in the case of Missouri which it had not claimed in that of Louisiana.

The claim is so far well founded that it is difficult to deny the parallelism between Louisiana and Missouri. The North, therefore, in order to secure the rest of the Louisiana Purchase in its normal condition of freedom, was compelled to pay for its twenty years' *laches* by surrendering the modern States of Missouri and Arkansas to the slaveholding settlers whom it had allowed to enter and possess them.

It cannot, however, be too strongly insisted that what Randolph called the "dirty bargain" had two sides, that the South had formally abandoned all future claim to establish slavery in Territories north of 36° 30'; that the North had tacitly pledged itself not to exert the power of Congress to abolish slavery *in the Louisiana Purchase* south of that line; and that both sides had recognized the absolute power of Congress over slavery in the Territories, without which the compromise could never have been made. In 1836, when admitting Arkansas as a



State, the North was strongly tempted to break its agreement, but refused to do so, even John Quincy Adams insisting that the admission of Arkansas as a slave State was "so nominated in the bond," and must be punctually fulfilled. In 1852-4,<sup>1</sup> the Southern leaders broke the agreement which their section had made.

Attention should also be called to the evil effects of the Missouri Compromise.

1. It recognized by law that which every effort should have been made to blot out, the existence of a geographical line which divided the whole people into two sections, and it thus went so far to establish parties on this geographical line. Jefferson's eye was quick to recognize this fact. In his letter of April 22, 1820, to John Holmes, he says:

"This momentous question, like a fire-bell in the night, awakened and filled me with terror. I considered it at once as the knell of the Union. It is hushed, indeed, for the moment; but this is a reprieve only, not a final sentence. A geographical line, coinciding with a marked principle, moral and political, once conceived and held up to the angry passions of men, will never be obliterated, and every new irritation will mark it deeper and deeper."

From this time parties were to be really national only so long as the question of slavery was kept under cover; when that question came to the surface, the whole controlling intelligence of the South spoke in the language of Dixon, of Kentucky, in 1854: "Sir, upon the question of slavery I know no whiggery and I know no democracy—I am a pro-slavery man."

2. In this compromise, however faithfully kept by both sides, lay the elements of future conflict. A comparison of the western territory of the United States with the country's steady rate of increase in population should

<sup>1</sup> See Kansas-Nebraska Bill; Democratic Party, V.

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have shown the statesmen of 1820 that the southwestern boundary was so abrupt a barrier to the movement of migration that it could not endure. When it should be broken down, and when new territory, not covered by the Missouri Compromise, should be added to the United States, it was not to be expected that the South should then submit to a restriction upon slavery which it had successfully resisted in 1820. Bonds which cannot restrain a child will not be very effective when he has grown to be a strong man; and, this principle of a division of territory once admitted, it was plain that future acquisitions of territory would be for the benefit, not of the whole nation, but of a partnership of two, whose Southern member would be certain to claim a full share.

The above is usually considered the Missouri Compromise, though there were some difficulties still to be settled. 1. In the presidential election of 1820, Missouri, though not yet admitted as a State, chose presidential electors, and many of the Southern members sought to have their votes counted. This difficulty was avoided by counting the votes in the alternative. 2. The constitution of Missouri was found to discriminate against free colored persons, who were citizens in many of the States. The joint resolution of March 2, 1821, therefore, admitted the State on condition of the abrogation of this discrimination. After Maine was admitted and the act had passed barring slavery north of  $36^{\circ} 30'$ , Missouri was still kept out. Bad faith was charged and threats were made of undoing the compromise. This stage of the controversy was most marked by heat and passion, and it was in this part of the controversy that Clay was instrumental in securing a peaceful settlement. Clay had little to do with what is known as the Missouri Compromise and he was not the author of it, but he was instrumental in allaying the strife that arose (after the compromise had been agreed to) over Missouri's constitution and the last

stages of her admission. He afterwards expressed surprise that he had become so generally reputed to be the author of this compromise.<sup>1</sup>

COMPROMISE OF 1850. — The principle of the Missouri Compromise, the supreme control of Congress over the Territories, even in the regulation or abolition of slavery, remained undisputed for nearly thirty years. It had been recognized in 1820 by 34 out of 44 in the Senate (the vote on the Thomas amendment), by 134 out of 176 in the House, by President Monroe, and by all his Cabinet, which included John C. Calhoun and Wm. H. Crawford from the South. It received a new endorsement in the joint resolution for the admission of Texas in 1845, whose third paragraph forever prohibited slavery in States to be formed from the new territory north of 36° 30' north latitude.

The affirmative vote in this instance included such representative Southerners as Armistead Burt, Howell Cobb, Cave Johnson, Rhett, Slidell, A. H. Stephens, Jacob Thomson, Tucker, and Yancey, though their vote was prompted, not by any desire to make any Territory free, but by a determination to divide the new territory by the geographical line which Jefferson had so much dreaded, and thus by implication to extend slavery to the southern portion of it.

The Mexican war brought a new addition of territory, and, from the first prospect (in 1846) of its acquisition, many Northern delegates renewed the claim that it was normally free soil, and must not be opened to slavery.<sup>2</sup> The Wilmot Proviso was essentially the same as the Tallmadge proviso above mentioned, and was defended on the same ground, the normal freedom of national territory. Additional argument in its favor was drawn from

<sup>1</sup> See Clay's speech of February 6, 1850; and Douglas's speech of March 3, 1854, on the Kansas-Nebraska Bill.

<sup>2</sup> See Wilmot Proviso.

the undisputed fact that the Territory just acquired was already free by the organic law of Mexico; but this reasoning was unnecessary, unless as cumulative, for the case was strong enough already.<sup>1</sup>

For three years (August, 1846, to December, 1849), the struggle over the Wilmot Proviso continued, regularly taking a sectional form. The new Territories were repeatedly organized by the House, with the Wilmot Proviso, and as regularly the bills were lost in the Senate, where the Southern vote was always aided by a sufficient number of Northern Senators to form a majority. But, though the South thus stood strictly on the defensive, the Northern Democrats had in the meantime elaborated a new party dogma, popular sovereignty, or squatter sovereignty, by which they hoped to retain in the party both its Northern and its Southern vote. As at first enunciated, it declared only that Congress ought not (as a matter of policy) to interfere with slavery in the Territories; as elaborated in the Kansas-Nebraska bill in 1854, it went to the further ground that Congress had no constitutional right to do so. During this period of contest the Free-Soil party began its brief existence.<sup>2</sup>

In the South the excitement among the controlling body of slaveholders had grown so intense that its culmination marks the year 1850 as the point where the theory of secession first began to shade into possibility. The people of the still unorganized Territory of California, whose population had been suddenly and enormously increased by the discovery of gold, had formed a State constitution, June 3, 1849, expressly prohibiting slavery. During the year the excitement was increased by the action of the people of New Mexico, to which Texas asserted a territorial claim, in forming a State constitution, May 15, 1850.

<sup>1</sup> See *Slavery ; Territories ; Dred Scott Case*, IV.

<sup>2</sup> See also *Democratic Party*, IV.; *Whig Party*, II.

This was interpreted as an effort to add another to the growing column of free States, and an army was at once raised in Texas to extend the jurisdiction of that State over the disputed territory. A convention of slave State delegates met at Nashville, Tennessee, June 2, 1850, and declared any exclusion of slaveholders and their property from the new Territories to be an injury and an insult to the South; and the various Southern Legislatures had instructed their governors, in the event of the success of the Wilmot Proviso, to call State conventions in order to secure concert of action against a common danger.

A new Congress met in December, 1849. The Senate was strongly Democratic; in the House the Free-Soilers held the balance of power between the Democrats and Whigs, so that there was no party majority, and the Speaker was only elected on the sixty-third ballot by a plurality vote. It was not until January 11, 1850, that the House succeeded in choosing all its officers, and became ready for legislation. Ten days afterward a message from President Taylor announced that he had advised the new Territories to apply for admission as States, and that California had already formed a State constitution. Southern members objected to the admission of California, ostensibly because of the unreasonably large amount of territory claimed by the new State; but California was only about one third as large as Texas claimed to be, and the objection really lay to the anti-slavery clause in the California constitution.

Many of the Southern members were determined to compel California to become a Territory before becoming a State, and a bill to organize "the Territories of California, Deseret (Utah), and New Mexico" was introduced, January 16th, in the Senate. January 29th, Clay introduced a series of eight resolutions, the basis of the final Compromise of 1850, which were in substance as follows: 1. The admission of California, "with suitable boun-

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daries," and without any restriction as to slavery. 2. The organization of territorial governments in the rest of the Mexican annexation, without any reference to slavery, since "slavery did not exist by law, and was not likely to be introduced" into them. 3. That Texas should not include any part of New Mexico. 4. That Texas should be paid \$—— for giving up her claim to New Mexico. 5. Non-interference with slavery, and, 6, abolition of the slave trade, in the District of Columbia. 7. A more effectual fugitive slave law. 8. Non-interference with the inter-State slave trade.

These resolutions were debated for two months after February 5th, and the debate ended, April 19th, by their reference to a compromise committee of thirteen, of which Clay was chairman. May 8th, the committee reported the following propositions, which finally made up the Compromise of 1850: 1, the admission of any new States properly formed from Texas, with or without slavery, as the people of the new State should decide; 2, the admission of California on similar terms; 3, the organization of New Mexico and Utah Territories *without* the Wilmot Proviso; 4, the passage of the last two measures in one bill; 5, the payment to Texas of an indemnity of \$10,000,000 for the abandonment of her claim to New Mexico; 6, the passage of a more effective fugitive slave law; 7, the abolition of the slave trade, but not of slavery, in the District of Columbia.

Many Senators desired to consider these measures separately, but the committee had decided to embrace them all in one bill, of four parts, commonly called the omnibus bill. Part I was in 39 sections: §§ 1-4 for the admission of California; §§ 5-21 for the organization of the Territory of Utah, with a prohibition against the passage of laws "in respect to African slavery" by its Legislature; §§ 22-38 for the organization (with the same prohibition) of the Territory of New Mexico; and § 39

for the fulfilment of proposition 5 above. Parts 2 and 3, in three sections, carried out proposition 6 above, and formed the celebrated Fugitive Slave law. Part 4, in two sections, carried out proposition 7 above.

The omnibus bill was debated until the last day of July, when it was discovered that successive amendments had cut out all its provisions except the Utah bill, which was passed August 1st.

By this time the martial preparations of Texas, backed by offers of aid from other Southern States, had shown some compromise to be necessary, if war was not to follow. The other bills, which had failed together, were now passed separately by the Senate: the Texas bill, August 10th, 30 to 20; the California bill, August 13th, 34 to 18; the New Mexico bill, August 14th, 27 to 10; the Fugitive Slave bill, August 23d, 27 to 12; and the District of Columbia bill, September 14th, 33 to 19. In the House the Texas and New Mexico bills were passed together, September 4th, 108 to 97; the California bill, September 7th, 150 to 56; the Utah bill, September 7th, 97 to 85; the Fugitive Slave bill, September 12th, 109 to 75; and the District of Columbia bill, September 17th, 124 to 47. All the provisions of Clay's scheme of compromise were therefore finally successful.

The gist of the compromise, as stated by Clay himself in debate, July 22d, was, on the one hand, forbearance by the North to insist upon the application of the Wilmot Proviso to Utah and New Mexico, and, on the other hand, forbearance by the South to insist upon the express introduction of slavery into those Territories; all the other measures were only feathers to fly the arrow. The North was to obtain the effectual application of the Wilmot Proviso to California, by its admission as a free State, and also the abolition of the slave trade in the District of Columbia; the South was to obtain an effective fugitive slave law, and an indemnity to Texas, of

whose bonds many of the Southern leaders were holders. There was no application of popular sovereignty to the new Territories, for their Legislatures were forbidden to pass laws on the subject of slavery; nor was there any settlement of the status of slavery there, for the committee's bill, as stated by Clay on introducing it, did not decide whether slavery did or did not exist in Utah or New Mexico, only forbidding the Legislatures to prohibit it if it existed, or to introduce it if it did not exist. Clay's own belief, as he then stated it, was that slavery did not exist there, having been abolished by Mexican law.

The whole arrangement was evidently a mere makeshift, intended to avoid the question of slavery in Utah and New Mexico, in the hope that these Territories would soon form State governments and decide the matter for themselves. There is not the slightest perceptible evidence, either in the omnibus bill or in the debates, of any intention to repeal, directly or indirectly, the Missouri Compromise or its prohibition of slavery north of the parallel of  $36^{\circ} 30'$ ; nor did the Texas bill make any repeal of the prohibition of slavery in new States to be formed from Texas north of the Missouri Compromise line, which had been first imposed by the joint resolution admitting Texas. Had the Compromise of 1850, as it was understood by its framers and by the two parties which formally indorsed it in 1852, been maintained, there seems to be very little doubt that the United States might have prolonged for many years the desperate effort to "endure one-half slave and one-half free." The Kansas-Nebraska bill was really as much a repeal of the Compromise of 1850 as of the Compromise of 1820.<sup>1</sup>

See (I.-III.), authorities under Convention of 1787; (IV.: Missouri Compromise), 6 Hildreth's *United States*, 661; 1 Greeley's *American Conflict*, 74; 1 von Holst's

<sup>1</sup> See Slavery, Secession, Rebellion.



*United States*, 356; 6, 7 Benton's *Debates of Congress*; 3 Spencer's *United States*, 322; 1 Colton's *Life and Times of Clay*, 276; Story's *Commentaries*, § 1316, and other authorities under Territories; Giddings's *History of the Rebellion*, 51; 1 Draper's *Civil War* (introd. chap.); 1 Wilson's *Rise and Fall of the Slave Power*, 135; 4 Jefferson's *Works* (ed. 1829), 323; 1 Benton's *Thirty Years' View*, 8; H. Wheaton's *Life of W. Pinkney*, 573 (the best argument for the Southern view of the question); 2 A. H. Stephens's *War between the States*, 131; 2 Garland's *Life of Randolph*, 118; authorities under Slavery; the act admitting Missouri is in 3 *Stat. at Large*, 645, and the proclamation announcing the admission is in 6 *Stat. at Large* (Bioren and Duane's edit.), 666; (V.: Compromise of 1850), 3 von Holst's *United States*; 1 Greeley's *American Conflict*, 198; 16 Benton's *Debates of Congress*, 384; 3 Spencer's *United States*, 476; Giddings's *History of the Rebellion*, 309; 2 Colton's *Life and Speeches of Clay*; 2 Benton's *Thirty Years' View*, 694, 742, and other authorities under Wilmot Proviso; 5 Webster's *Works*, 324 (his 7th of March speech); Harvey's *Reminiscences of Webster*; 2 Curtis's *Life of Webster*, 381; 2 Wilson's *Rise and Fall of the Slave Power*, 241; 4 Stryker's *American Register*, 505, 582 (the latter being the proposed constitution of the State of New Mexico); Schuckers's *Life of S. P. Chase*, 105; 2, 3 Sumner's *Speeches*; 2 A. H. Stephens's *War between the States*, 165; Buchanan's *Buchanan's Administration*, 19; 2 Story's *Life of Story*, 392, and other authorities under Fugitive Slave Law, Slavery; Rhodes's *History of U. S.*; Schouler's *History of U. S.*; Bancroft's *Seward*; Burgess's *Middle Period*; Woodburn's "Historical Significance of the Missouri Compromise," *Am. Hist. Assoc. Papers*, 1893.

## CHAPTER VI

### THE FUGITIVE SLAVE

**A**FTER the Compromise of 1850 the country settled down in the hope of having peace on the subject of slavery. The settlement of 1850 was regarded as a "finality," and the political and party forces of the country brought every agency and influence to bear to prevent any reopening of the agitation. The great body of public sentiment in both sections accepted the settlement,—except the extreme pro-slavery disunionists and secessionists in the South and the radical Abolitionists and Free-Soilers of the North. The Democratic party was reunited in the election of 1852 and the independent Free-Soil vote fell off almost one half from that of 1848.<sup>1</sup>

There was one factor in the situation, however, that kept the subject of slavery before the people of the North and which continued to offer an opportunity for agitation and excitement. That was the fugitive slave. But for the reopening of the territorial question by the Kansas-Nebraska act in 1854 and the occasional excitement and resistance in opposition to the execution of the Fugitive Slave law, it is reasonable to suppose that the country might have continued at peace on slavery for some years to come. But the Fugitive Slave law and its operation offered frequent occasions to the anti-slavery men to renew the agitation.

Before the American Revolution the black race in the

<sup>1</sup> See Parties.

colonies had generally been impressed with the artificial character, in the eye of the law, of property.<sup>1</sup> Within his own colony an owner had the same right to reclaim his slave as to reclaim any other stolen, lost, or estray property; but the reclamation of a slave who had escaped to another colony depended upon the intercolonial comity which permitted it. Nor was there any legal authority to reclaim fugitive slaves under the Articles of Confederation, except that which was, perhaps, implied in confining to "the *free* inhabitants of these States" the enjoyment of "the privileges and immunities of free citizens in the several States." Reclamations of fugitive slaves, though rare, sometimes occurred, but were still dependent on inter-State comity.

In the formation of the Constitution by the convention of 1787, it seems to have been an implied part of one of the compromises<sup>2</sup> that a provision should be inserted for the reclamation of fugitive slaves.<sup>3</sup>

"By this settlement" [compromise], said C. C. Pinckney, in the South Carolina convention, "we have obtained a right to recover our slaves in whatever part of America they may take refuge, which is a right we had not before. In short, considering all circumstances, we have made the best terms for the security of this species of property it was in our power to make. We would have made it better if we could; but, on the whole, I do not think them bad."

The result was the fugitive slave provision.<sup>4</sup> In this, slaves were indirectly called "persons held to service or labor in one State, under the laws thereof." The provision was mandatory, but upon no particular officer or branch of the Government; it simply directed that the

<sup>1</sup> See Slavery.

<sup>2</sup> See Compromises.

<sup>3</sup> A different view is expressed by the editor under Compromises.

<sup>4</sup> See Constitution, Art. IV., § 2, ¶ 3.

fugitive "shall be delivered up, on claim of the party to whom such service or labor may be due." If this was only a direction to the States, it is evident that the only recourse for relief under it was to State courts; and that, if a State should refuse or neglect to execute and obey this provision of the Constitution, there was no remedy.

Such has steadily been held as the construction of the kindred provision, as to extradition of criminals, immediately preceding the fugitive-slave provision, and couched in much the same language. Though the surrender of criminals has sometimes been refused, as by Massachusetts in the Kimpton case in August, 1878, no further remedy has been sought for, nor has Congress ever undertaken to pass any general inter-State extradition law. The only real argument in favor of the power and duty of Congress to pass a general fugitive slave law was the absence of any such common self-interest to induce the Northern States to execute faithfully the fugitive slave provision of the Constitution, as that which was usually certain to induce all the States to surrender fugitive criminals.

The first Fugitive Slave law, entitled "An act respecting fugitives from justice, and persons escaping from the service of their masters," originated in the Senate, passed the House without debate by a vote of 48 to 7, and was approved by President Washington, February 12, 1793. It was in four sections. The first two, applying to fugitive criminals, merely specified the manner in which the demand was to be made upon the governor, and made no attempt to enforce a surrender of the criminal, if it should be refused. An abstract of the last two sections, respecting fugitives from labor, is as follows: 3, the owner, his agent or attorney, was empowered to seize his fugitive slave, take him before a circuit or district court of the United States, or before any magistrate of the county, city, or town corporate, wherein the arrest should be

made, and make proof by oral testimony or affidavit of his ownership, and the certificate thereof by the judge or magistrate was to be sufficient warrant for the removal of the fugitive to the State or Territory from which he had fled; 4, rescue, concealment, or obstructing the arrest of a fugitive slave were made offences liable to a fine of \$500.

Before 1815 the increase of the domestic slave trade from the border States to the extreme South had brought out complaints of the kidnapping of free blacks in the border free States, under pretence that they were fugitive slaves. In 1817 a Senate committee reported a bill to modify the law, but it was never considered. The following year the Baltimore Quakers renewed the question by a petition to Congress for some security to free blacks against kidnapping. On the other hand, the border slave States complained of the increased insecurity of slave property, and a member of the House from Virginia introduced a bill to increase the efficiency of the Fugitive Slave law. It was intended to enable the claimant to prove his title before a judge of his own State, and thus to become entitled to an executive demand upon the Governor of the State in which the fugitive had taken refuge; and to any writ of *habeas corpus* it was to be a sufficient return that the prisoner was held under the provisions of this act.

Efforts to amend the bill by securing the full benefit of the writ of *habeas corpus* to the fugitive, and by making the State courts of the State in which the arrest was made the arbiter of title, were voted down, and the bill was carried January 30, 1818, by a vote of 84 to 69. In the Senate it was passed, March 12th, with amendments requiring other proofs than the claimant's affidavit, and limiting the existence of the act to four years. April 10th the House refused to consider the bill further.

The great objection to the act of 1793 was its attempt to impose service, under the act, upon magistrates who

were officials of the States, not of the Federal Government, and who could not, therefore, properly be called upon to execute Federal laws.

The question was brought before the Supreme Court (in the case of *Prigg vs. Pennsylvania*, cited below), as follows: The State of Pennsylvania had passed an act providing a mode for the rendition of fugitive slaves to their owners by State authorities, and making the seizure of fugitive slaves in any other way a felony. One Prigg, as agent of a Maryland slave-owner, found a fugitive slave in Pennsylvania, and, when the local magistrate refused to award her to him, carried her off to Maryland *vi et armis*. For this he was indicted in Pennsylvania, and the two States amicably agreed that judgment should be entered against him, in order that an appeal might be taken to the Supreme Court.

The Supreme Court, as its opinion was given by Story, held that the Pennsylvania statute was unconstitutional; that the power to legislate on this subject was exclusively in Congress; but that the duty of executing Federal laws could not be imposed upon State magistrates or officers. Taney, dissenting in part, held that the Constitution was a part of the supreme law of every State, which the State could enforce, but could not abrogate or alter; and that the right of a master to seize his fugitive slave was thus a part of the organic law of each State, which the State could enforce, but could not abrogate or alter. The doubts expressed by the court as to the duty of State magistrates caused the passage by various Northern Legislatures of acts guarding or prohibiting the execution of the Fugitive Slave law by State magistrates.<sup>1</sup>

The passage of a more effective fugitive slave law was one of the essential features of the Compromise of 1850,<sup>2</sup> and formed a part of the original "omnibus bill."

<sup>1</sup> See Personal Liberty Laws.

<sup>2</sup> See Compromises.

As approved by President Fillmore, September 18, 1850, it consisted of ten sections, an abstract of which is as follows: 1, the powers of judges under the act of 1793 were now given to United States commissioners; 2, the territorial courts were also to have the power of appointing such commissioners; 3, all United States courts were so to enlarge the number of commissioners as to give facilities for the arrest of fugitive slaves; 4, commissioners were to have concurrent jurisdiction with United States judges in giving certificates to claimants and ordering the removal of fugitive slaves; 5, United States marshals and deputies were required to execute writs under the act, the penalty for refusal being a fine of \$1000, the marshal being further liable on his bond for the full value of any slave escaping from his custody "with or without the assent" of the marshal or his deputies; the commissioners, or officers appointed by them, were empowered to call the bystanders to help execute writs; and all good citizens were required to aid and assist when required; 6, on affidavit before any officer authorized to administer an oath, United States courts or commissioners were to give the claimant a certificate and authority to remove his fugitive slave whence he had escaped; in no case was the testimony of the fugitive to be admitted in evidence; and the certificate, with the seal of the court, was to be conclusive evidence of the claimant's title, thus cutting off any real benefit of the writ of *habeas corpus* from the fugitive; 7, imprisonment for six months, a fine of \$1000, and civil damages of \$1000 to the claimant, were to be the punishment for obstructing an arrest, attempting a rescue, or harboring a fugitive after notice; 8, commissioners were to be paid fees of \$10 when a certificate was granted, and of \$5 when their decision was in favor of the alleged fugitive; fees of other officers were to follow the rules of the court; 9, on affidavit by the claimant that he apprehended a rescue, the marshal was not to

surrender the fugitive to the claimant at once, but was first to take him to the State whence he had fled, employing any assistance necessary to overcome the rescuing force; 10, any claimant, by affidavit before any court of record in his own State or Territory, might obtain a record with a general description of the fugitive, and an authenticated copy of such record was to be conclusive evidence, on proof of the identity of the fugitive, for issuing a certificate in any State or Territory to which the slave had fled.

An examination of this long and horribly minute act will show the futility of the most taking and popular criticism upon it, that it employed all the force of the United States in "slave catching." This was just what the act was bound to do, if it attempted to enforce the fugitive slave provision of the Constitution, and yet avoid the imposition of the duty upon State officials. Nor is there any more force in the objection to the difference in the commissioner's fee for detaining and for releasing a fugitive: the difference in fees was the price of the evident difference in the labor involved in the two cases; and no accusation was ever brought against a commissioner of having sold his honor for the additional \$5.

But the refusal of a jury trial to the alleged fugitive, for the ascertainment of his identity, was a defect so fatal as to make the law seem not only unconstitutional, but absolutely inhuman. If the alleged fugitive were a slave (*i. e.*, property), his value was more than \$20, above which limit the Constitution (Amendment VII.) guarantees a jury trial for title; if he were a free man, his right to a jury trial in a case affecting his life or liberty dates from Magna Charta, and is among the rights reserved, by Amendment X., from the power of both the United States and the States "to the people"; and in denying a jury trial in either case Congress seems to have been an inexcusable trespasser. Webster proposed, and Dayton,



of New Jersey, offered, an amendment providing for a jury trial; but this was voted down, on the ground that a fugitive slave was property, and yet that the owner's title was not disputed or in question, so as to require a jury trial. But this was evidently begging the question, for, 1, an alleged fugitive, if a free man, evidently had the right to a jury trial to decide whether he was property or a person; and, 2, no Federal law could make the affidavit of a citizen of one State so "conclusive" as to exclude entirely the affidavit of a citizen of another State, as any alleged fugitive might possibly be.

Against this evil feature of the act many Northern Legislatures promptly guarded by passing new or stronger "personal liberty laws," and thus practically "nullifying" it.<sup>1</sup>

The passage of the act gave a sudden and great impetus to the search for fugitive slaves in the North, which was accompanied by various revolting circumstances, brutality in the captors, bloodshed by the captors or captured, or both, and attempted suicide to avoid arrest. From many localities in the North, persons who had long been residents were suddenly seized and taken South as fugitive slaves; and these latter arrests were more efficacious than the former in rousing Northern opposition to the law, for they seemed to show that not merely the execution but the principle of the law was unjust and illegal. Margaret Garner's attempted murder of her children, in Ohio, to save them from slavery, and Anthony Burns's arrest in Boston, were the cases which made most noise at the time.

The political consequences of the passage of the Fugitive Slave law of 1850 were not only the revival and enforcement of the personal liberty laws, but the demand, first by the Free-Soil party, and then by many members of the Republican party, for the repeal of the Fugitive

<sup>1</sup> See Nullification, Personal Liberty Laws.

Slave law, which the South considered irrepealable, as part of a compromise. The success of the Republican party, in 1860, by a vote of the North, was therefore construed by secessionists at the South as a final refusal by the North to enforce the Compromise of 1850, and was the principal excuse for secession.

The Fugitive Slave law was not finally repealed until June 28, 1864.<sup>1</sup>

**PERSONAL-LIBERTY LAWS.**—Statutes passed by the Legislatures of various Northern States, during the existence of the Fugitive-Slave laws, for the purpose of securing to alleged fugitives the privilege of the writ of *habeas corpus* and the trial by jury, which those laws denied them.

In 1840 New York passed an act securing a trial by jury to persons accused of being fugitive slaves. This was the first real "Personal-Liberty law," other previous State Statutes being ostensibly or really designed to assist in the rendition of fugitives; and even this statute soon fell into disuse and was practically forgotten. The case of *Prigg vs. Pennsylvania* was decided in 1842, and in 1843 Massachusetts and Vermont passed laws prohibiting State officers from performing the duties exacted of them by the first Fugitive-Slave law, and forbidding the use of the jails of the State for the detention of fugitives. In 1847 and 1848 Pennsylvania and Rhode Island passed similar laws. Other States refused to do so.

The passage of the Fugitive-Slave law of 1850, which avoided all employment of State officers, necessitated a change in the Personal-Liberty laws. Accordingly, new laws were passed by Vermont, Rhode Island, and Connecticut in 1854, by Maine, Massachusetts, and Michigan in 1855, by Wisconsin and Kansas in 1858, by Ohio in 1859, and by Pennsylvania in 1860.

These laws generally prohibited the use of the State's

<sup>1</sup> See Compromises ; Slavery ; Republican Party ; Abolition ; Secession.

jails for detaining fugitives; provided State officers, under various names, throughout the State, to act as counsel for persons alleged to be fugitives; secured to all such persons the benefits of *habeas corpus* and trial by jury; required the identity of the fugitive to be proved by two witnesses; forbade State judges and officers to issue writs or give any assistance to the claimant; and imposed a heavy fine and imprisonment for the crime of forcibly seizing or representing as a slave any free person with intent to reduce him to slavery. New Hampshire, New York, New Jersey, Indiana, Illinois, Iowa, Minnesota, California, and Oregon passed no full Personal-Liberty laws; but there were only two of these States, New Jersey and California, which gave any official sanction or assistance to the rendition of fugitive slaves, though three of them, Indiana, Illinois, and Oregon, did so indirectly, by prohibiting the entrance within their borders of negroes either slave or free. In the other States named above, the action of the legislative, judiciary, or executive was generally so unfriendly that the South Carolina declaration of causes for secession in 1860 included Illinois, Indiana, Iowa, and New Hampshire with the ten States which had passed liberty laws, in the charge of having violated their constitutional obligation to deliver fugitive slaves.

The Fugitive-Slave law and the Personal-Liberty laws together show plainly that the compromise of 1850<sup>1</sup> was far worse than labor lost. It gave the South a law to which it had no title; even Rhett, in the South Carolina secession convention, declared that he had never considered the Fugitive-Slave law constitutional. It thus provoked the passage of the Personal-Liberty laws in the North. Each section, ignoring the other's complaints, exhausted its own patience in calling for a redress which neither was willing to accord first.

<sup>1</sup> See Compromises.

It is not meant to be understood that secession would never have occurred without the aid of the Fugitive-Slave law and its countervailing statutes; only that secession would have had to search much more diligently for an excuse without them. Throughout the whole declaration of South Carolina in 1860 there is hardly an allegation which, in any point of view, deserves respectful consideration, with this single exception of the Personal-Liberty laws; and these were the unconstitutional results of the unconstitutional Fugitive-Slave law.

The objection to the constitutionality of the Fugitive-Slave law is, in brief, that the rendition of fugitive slaves, as well as of fugitives from justice, was an obligation imposed by the Constitution upon the States; and that the Federal Government, which has never attempted to give the law in the latter case, had no more right to do so in the former.<sup>1</sup>

This opinion, however, has against it the unanimous opinion of the Supreme Court in the case of *Ableman vs. Booth*, cited below. But there is absolutely no legal excuse for the Personal-Liberty laws. If the rendition of fugitive slaves was a Federal obligation, the Personal-Liberty laws were in flat disobedience to law; if the obligation was upon the States, they were a gross breach of good faith, for they were intended, and operated, to prevent rendition; and in either case they were in violation of the Constitution, which the State legislators themselves were sworn to support. The dilemma is so inevitable that only the pressure of an intense and natural horror of surrendering to slavery a *man* who had escaped from it, or who had never been subject to it, can palliate the passage of the laws in question. Plainly, the people, in adopting the fugitive-slave clause of the Constitution, had assumed an obligation which it was not possible to fulfil.

<sup>1</sup> See Fugitive-Slave Laws.

The writer's own belief, that the obligation of rendition was upon the States alone, has prevented him from classing the Personal-Liberty laws under nullification. If, however, the obligation was really Federal, they were certainly nullifications, though not to the same degree as that of South Carolina; for the latter absolutely prohibited the execution of the tariff act, while the former only impeded the rendition of fugitive slaves. The principle, however, is the same.<sup>1</sup>

It is worthy of notice, however, that when the Supreme Court, in the case of *Ableman vs. Booth*, overrode the Wisconsin Personal-Liberty law, the Wisconsin Legislature passed a series of resolutions, March 19, 1859, reaffirming the Kentucky Resolutions of 1799,<sup>2</sup> but making them read "that a *positive defiance*" (instead of a nullification) "is the rightful remedy."

THE OSTEND MANIFESTO.—The filibustering expeditions against Cuba occasioned anxiety in Europe as to the possible future action of the United States Government in concealed or open favor of such expeditions. In 1852 Great Britain and France jointly proposed to the United States a tripartite convention, by which the three powers should disclaim all intention to obtain possession of Cuba, and should discountenance such an attempt by any power. December 1, 1852, the Secretary of State, Everett, refused to do so, while he declared that the United States would never question Spain's title to the island. Everett's letter has been severely criticised, but it seems justifiable as a refusal to voluntarily and needlessly restrict future administrations.

August 16, 1854, President Pierce directed the American ministers to Great Britain, France, and Spain, James Buchanan, John Y. Mason, and Pierre Soulé, to meet in some convenient city and discuss the Cuban question. They met at Ostend, October 9th, and afterward at Aix

<sup>1</sup> See Nullification.

<sup>2</sup> See Kentucky Resolutions.

la Chapelle, and drew up the dispatch to their government which is commonly known as the "Ostend Manifesto." It declared, in brief, that the sale of Cuba would be as advantageous and honorable to Spain as its purchase would be to the United States; but that, if Spain should obstinately refuse to sell it, self-preservation would make it incumbent upon the United States to "wrest it from her," and prevent it from being Africanized into a second St. Domingo.

The Ostend Manifesto was denounced in the Republican platform of 1856 as "the highwayman's plea that might makes right"; and was not openly defended by the Democratic platform of 1856 or 1860, except that the latter declared in favor of the acquisition of Cuba by honorable and just means, at the earliest practicable moment. See Greeley's *American Conflict*; Rhodes's *History of the United States*; Schouler's *Hist. of U. S.*; Cluskey's *Political Text-Book*; Wilson's *Rise and Fall of the Slave Power*; Cairnes's *Slave Power*; *American History Leaflets*, No. 2.

On the Fugitive Slave Law see 4 Elliot's *Debates*, 286; 1 Benton's *Debates of Congress*, 384, 417; 1 von Holst's *United States*, 310; *Prigg vs. Pennsylvania*, 16 *Pet.*, 539; 6 Benton's *Debates of Congress*, 43, 107, 177; the act of February 12, 1793, is in 1 *Stat. at Large*, 302. See 16 Benton's *Debates of Congress*, 593; 2 Benton's *Thirty Years' View*, 773; 5 Stryker's *American Register*, 547, 550; *Buchanan's Administration*, 16; Tyler's *Life of Taney*, 282, 392; *Ableman vs. Booth*, 21 *How.*, 506; 2 Wilson's *Rise and Fall of the Slave Power*, 291-337, 435; Schuckers's *Life of Chase*, 123, 171; 2 Webster's *Works*, 558, and 5:354; Butler's speech in the Senate January 24, 1850; McPherson's *History of the Rebellion*, p. 237; Moses Stuart's *Conscience and the Constitution*; Still's *Underground Railroad*, 348; Stevens's *History of Anthony Burns*; 1 Greeley's *American Conflict*, 210; 2 A. H.

Stephens's *War Between the States*, 674 (in the Declaration of South Carolina); Hamilton's *Memoir of Rantoul*, 729; authorities under articles above referred to; the Fugitive-Slave law is in 9 *Stat. at Large*, 462; the act of June 28, 1864, is in 13 *Stat. at Large* (38th Congress), 410. See also Sumner's speech, August 26, 1852; Sumner's *Works*, for Reply to his Assailants, January 28, 1854; Storey's *Sumner; Reminiscences of Levi Coffin*; Siebert's *Underground Railroad*; Rhodes's *U. S. History*; Burgess's *Middle Period*.

On Personal Liberty Laws see *Massachusetts Revised Statutes* (1860), c. 125, § 20; 2 Wilson's *Rise and Fall of the Slave Power*, 57, 639; Joel Parker's *Personal Liberty Laws* (1861); B. R. Curtis's *Works*, 328, 345; 2 *ib.*, 69; Tyler's *Life of Taney*, 398; Appleton's *Annual Cyclopædia* (1861), 575; 21 *How.*, 506 (*Ableman vs. Booth*); 2 Webster's *Works*, 577; Schuckers's *Life of Chase*, 178; Schouler's *Hist. of U. S.*, vol. iv., pp. 428, 429. Colloquy between Toombs and Collamer in U. S. Senate, Dec., 1860-Jan., 1861.

## CHAPTER VII

### THE KANSAS-NEBRASKA BILL: POPULAR SOVEREIGNTY AND THE STRUGGLE FOR KANSAS

**T**HE KANSAS-NEBRASKA BILL was the act of Congress by which the Territories of Kansas and Nebraska were organized in 1854. Its political importance consisted wholly in its repeal of the Missouri Compromise.

Judged by its results it was one of the most important acts in the legislative history of the United States. It precipitated the final phases of the slavery struggle which resulted in the Civil War. It led to a reorganization of political parties. "It set slavery and freedom face to face and bade them grapple" (Sumner).

Before the introduction of the bill it did not seem possible for any further question to arise as to slavery in the United States. In the several States slavery was regulated by State law; in the Louisiana Purchase both sections had in 1820 united to abolish slavery in the portion north of latitude 36° 30', ignoring the portion south of it; all the southern portion, outside of the Indian Territory, was covered soon afterward by the slave State of Arkansas; and in the territory afterward acquired from Mexico both sections had united in 1850 in an agreement to ignore the existence of slavery until it could be regulated by the laws of the States which should be formed therefrom in future. Every inch of the United States seemed to be thus covered by some compromise or other.<sup>1</sup>

<sup>1</sup> See Compromises.



The slavery question was in this condition of equilibrium when a bill was passed by the House, February 10, 1853, to organize the Territory of Nebraska, covering, also, the modern State of Kansas. It lay wholly within that portion of the Louisiana Purchase whose freedom had been guaranteed by the Missouri Compromise, and the bill therefore said nothing about slavery, its supporters taking it for granted that the Territory was already free. In the Senate it was laid on the table, March 3d, the affirmative including every Southern Senator except those from Missouri; but their opposition to the bill came entirely from an undefined repugnance to the practical operations of the Missouri Compromise, not from any idea that that compromise was no longer in force. If it had been repealed by the compromise of 1850, those most interested in the repeal do not seem to have yet discovered it in 1853.<sup>1</sup>

During the summer of 1853, following the adjournment of Congress, the discussion of the new phase, which the proposed organization of Nebraska at once brought about in the slavery question, became general among the Southern politicians. The Southern people do not seem to have taken any great interest in the matter, for it was very improbable that slave labor could be profitably employed in Nebraska, even if it were allowed. The question was wholly political. The territory in question had been worthless ever since it was bargained away to secure the admission of Missouri as a Southern and slaveholding State; but now immigration was beginning to mark out the boundaries of present Territories and potential States,

<sup>1</sup> Opposition to this first Nebraska bill in the Senate arose from matters touching Indian relations, their land titles, and their relation to the Texan frontier. See speeches of Bell and Houston in the Senate, March, 1853. That the status of slavery in the Territory was not considered as unsettled or uncertain is made clear from the speeches of Giddings and Atchison. See Burgess's *Middle Period*, Hay and Nicolay's *Life of Lincoln*, Rhodes's *U. S. History*.

which would, in the near future, make the South a minority in the Senate, as it had always been in the House, and perhaps place it at the mercy of a united North and Northwest.

To prevent this result it was of importance to Southern politicians, 1, that, if the Missouri Compromise was to endure, Nebraska should remain unorganized, in order to check immigration and prevent the rapid formation of another Northern State; 2, that, if the Missouri Compromise could be voided, Nebraska should at least be open to slavery, for the same purpose as above, since it was agreed on all hands that free immigration instinctively avoided any contact with slave labor; and 3, that, if slave labor could possibly be made profitable in Nebraska, the Territory should become a slave State, controlled by a class of slave owners in full sympathy with the ruling class of the Southern States. The last contingency was generally recognized as highly improbable; one of the first two was the direct objective point.

When Congress met in December, 1853, the Southern programme, as above stated, had been pretty accurately marked out. It was not a difficult task to secure the support of Northern Democrats for it, because the latter had for five years been advocating the right of the people of New Mexico to decide the status of slavery in that Territory.<sup>1</sup> The only step backward that was necessary was to accept the application of the doctrine to *all* the Territories, whether south or north of latitude 36° 30'. The excuse for this backward step was thus stated by Douglas in his report of January 4, 1854: "The Nebraska country occupies the same relative position to the slavery question as did New Mexico and Utah when those Territories were organized."

A wrong premise: for the difficulty in the case of New Mexico and Utah had arisen entirely from the fact that

<sup>1</sup> See Popular Sovereignty.

the status of slavery in them was unsettled, and could not be settled without a struggle; while in the case of Nebraska the struggle was rightfully over, and the status of slavery fixed.

Congressional action was directed, in the former case, toward an amicable adjustment of the dispute, and, in the latter case, toward a needless reopening of the dispute; and yet the assumed parallelism of the two cases was absolutely the only justification ever offered by Douglas and the Douglas Democracy of the North for their introduction and support of the Kansas-Nebraska bill. They seem to have been forced into it by their constitutional arguments in support of "squatter sovereignty"; after arguing that Congress had no constitutional power to prohibit slavery in New Mexico in 1850, it seemed difficult for them, without stultifying themselves, to argue in favor of the power of Congress in 1820 to prohibit slavery in Nebraska. They seem to have forgotten that the compromise of 1850 was confessedly not based upon constitutional grounds at all, but was a purely political decision, based upon expediency; that the *constitutional* objections to the power of Congress to prohibit slavery in a Territory applied equally to the power of Congress to prohibit a territorial legislature from legislating for or against slavery, and so struck at the very root of the compromise of 1850 itself; and that the expediency which counselled them to refrain from meddling with the slavery question in New Mexico and Utah as imperatively counselled them to refrain from disturbing the settlement of the slavery question in Nebraska.

December 15, 1853, in the Senate, A. C. Dodge, of Iowa, offered a bill to organize the Territory of Nebraska, but his bill, like the one of the preceding session, made no reference to slavery. January 4, 1854, it was reported with amendments by Douglas, chairman of the Committee on Territories.

The report endeavored to make out a parallel between New Mexico and Nebraska by comparing the Mexican abolition of slavery in the former case with the act of 1820 in the latter case; it remarked that in either case the validity of the abolition of slavery was questioned by many, and that any discussion of the question would renew the excitement of 1850; and it recommended, though not directly, that the Senate should organize the new Territory without "either affirming or repealing the 8th section of the Missouri act, or [passing] any act declaratory of the meaning of the Constitution in respect to the legal points in dispute." But the report stated the basis of the compromise of 1850 as follows: "That all questions pertaining to slavery in the Territories, and in the new States to be formed therefrom, are to be left to the decision of the people residing therein, by their appropriate representatives, to be chosen by them for that purpose."

This was, in the first place, incorrect, since the New Mexico and Utah acts left no such power to the territorial legislature,<sup>1</sup> and, in the second place, not pertinent, since it was an attempt to expand an act of Congress, passed for a particular purpose, into a great constitutional rule which was to bind subsequent Congresses. January 16th, Dixon, of Kentucky, gave notice of an amendment abolishing the Missouri Compromise in the case of Nebraska.

This was the first open signal of danger to the Missouri Compromise; and on the following day Sumner, of Massachusetts, gave notice of an amendment to the bill, providing that nothing contained in it should abrogate or contravene that settlement of the slavery question. Douglas at once had the bill recommitted, and, January 23d, he reported, in its final shape, the Kansas-Nebraska bill, which, in its ultimate and unexpected consequences, was one of the most far-reaching legislative acts in American history.

<sup>1</sup> See Popular Sovereignty.

The bill divided the Territory from latitude  $37^{\circ}$  to latitude  $43^{\circ} 30'$  into two Territories, the southern to be called Kansas and the northern Nebraska; the territory between latitude  $36^{\circ} 30'$  and  $37^{\circ}$  was now left to the Indians. In the organization of both these Territories it was declared to be the purpose of the act to carry out the following three "propositions and principles, established by the compromise measures of 1850": 1, that all questions as to slavery in the Territories, or the States to be formed from them, were to be left to the representatives of the people residing therein; 2, that cases involving title to slaves, or personal freedom, might be appealed from the local tribunals to the Supreme Court; and 3, that the Fugitive-Slave law should apply to the Territories. The section which extended the Constitution and laws of the United States over the Territories had the following proviso:

"except the eighth section of the act preparatory to the admission of Missouri into the Union, approved March 6, 1820, which, being inconsistent with the principles of non-intervention by Congress with slavery in the States and Territories, as recognized by the legislation of 1850, commonly called the compromise measures, is hereby declared inoperative and void; it being the true intent and meaning of this act not to legislate slavery into any Territory or State, nor to exclude it therefrom, but to leave the people thereof perfectly free to form and regulate their domestic institutions in their own way, subject only to the Constitution of the United States."

With the exception of these two novel features, the bill was the usual formal act for the organization of a Territory. An amendment offered by Chase, of Ohio, allowing the people of the Territory to prohibit the existence of slavery therein, if they saw fit, was voted down, 36 to 10. It is difficult to see any reason for the affirmative vote, since the Chase amendment was strictly in the line of "popular sovereignty," but it was probably due in

part to a general distrust of any amendment coming from the anti-slavery element, and in part to the idea that the closing words above given, "subject only to the Constitution of the United States," excluded the Chase amendment and made popular sovereignty unilateral in the Territories, with authority to permit slavery, but not to prohibit it.

March 3, 1854, the bill passed the Senate by a vote of 37 to 14. In the affirmative were fourteen Northern Democrats, and twenty-three Southern Democrats and Whigs; in the negative were eight Northern anti-slavery Senators, free-soilers, or "anti-Nebraska men,"<sup>1</sup> Bell, Southern Whig, Houston, Southern Democrat, and Hamlin, of Maine, James, of Rhode Island, and Dodge and Walker, of Wisconsin, Northern Democrats.

The bill was not taken up in the House until May 8th, and was passed, May 24th, by a vote of 113 to 100. The affirmative vote included forty-four Northern Democrats, fifty-seven Southern Democrats, and twelve Southern Whigs; the negative vote included forty-four Northern Democrats, two Southern Democrats, forty-four Northern Whigs, seven Southern Whigs, and three Free Soilers. May 30th, the Kansas-Nebraska bill was approved by the President, and became law.

The effects of the bill upon the parties of the time are elsewhere referred to.<sup>2</sup> They may be summarized as follows: 1, it destroyed the Whig party, the great mass of whose voters went over, in the South to the Democratic, and in the North to the new Republican party; 2, it made the Democratic party almost entirely sectional, for the loss of its strong anti-slavery element in the North reduced it in the course of the next few years to a hopeless minority there; 3, it crystallized all the Northern

<sup>1</sup> See Republican Party.

<sup>2</sup> See Democratic Party, V.; Whig Party, III.; Republican Party, I.; American Party.

elements opposed to slavery into another sectional party, soon to take the name of Republican; and 4, it compelled all other elements, after a hopeless effort to form a new party on a new issue, to join one or the other sectional party. Its effects on the people of the two sections were still more unfortunate: in the North, it laid the foundation for the belief, which the Dred Scott decision was soon to confirm, that the whole policy of the South was a greedy, grasping selfish desire for the extension of slavery; in the South, by the grant of what none but the politicians had hitherto asked or expected, the abolition of the Missouri Compromise, it prepared the people for the belief that the subsequent forced settlement of Kansas by means of emigrant aid societies was a treacherous evasion by the North of the terms of the Kansas-Nebraska bill. In other words, the Kansas-Nebraska bill, and still more the Dred Scott decision which followed it, placed each section in 1860, to its own thinking, impregnably upon its own peculiar ground of aggrivement: the North remembered only the violation of the compromise of 1820 by the Kansas-Nebraska bill, taking the Dred Scott decision as only an aggravation of the original offence; the South, ignoring the compromise of 1820 as obsolete by mutual agreement, complained of the North's refusal to carry out fairly the Kansas-Nebraska bill and the Dred Scott decision. And all this unfortunate complication was due entirely to Stephen A. Douglas's over-zealous desire to settle still more firmly and securely a question which was already settled.

On the other hand, it is but fair to give Douglas's grounds for his action, as reported by Cutts (cited below). Having shown the imperative necessity for immediate organization of the two Territories, he proceeds as follows (*italics as in original*):

"If the necessity for the organization of the territories did

in fact exist, it was right that they should be organized *upon sound constitutional principles*; and if the compromise measures of 1850 were a safe rule of action upon that subject, *as the country* in the presidential election and *both of the political parties* in their national conventions in 1852 had affirmed, then it was the duty of those to whom the power had been intrusted to frame the bills *in accordance with those principles*.

“There was another reason which had its due weight in the repeal of the Missouri restriction. The jealousies of the two great sections of the Union, north and south, had been fiercely excited by the slavery agitation. The Southern States would never consent to the opening of those Territories to settlement, so long as they were excluded by act of Congress from moving there and holding their slaves; and they had the power to prevent the opening of the country forever, inasmuch as it had been forever excluded by treaties with the Indians, which could not be changed or repealed except by a two-thirds vote in the Senate. But the South were willing to consent to remove the Indian restrictions, provided the North would at the same time remove the Missouri restriction, and thus throw the country open to settlement on equal terms by the people of the North and South, and leave the settlers at liberty to introduce or exclude slavery as they should think proper.”

All this is certainly of very great force, but only as a statement of the problem which was to be solved mainly by Douglas and the Northern Democracy, and not, as Douglas evidently takes it, as a justification of the particular solution which was adopted.<sup>1</sup>

POPULAR SOVEREIGNTY.—The acquisition of territory from Mexico brought with it a most troublesome and dangerous question, the status of slavery therein. Was the new Territory to be entirely free? was it to be entirely slave? was it to be equitably divided? or was Congress to refrain from interfering in any way, and allow the problem to gradually eliminate its own difficulties? The first

<sup>1</sup> See, further, Dred Scott Case, Slavery, Secession, United States.



proposition, the basis of the Free Soil and Republican parties successively, is elsewhere treated<sup>1</sup>; the third had comparatively few advocates, for the time had passed when even a Missouri Compromise line could settle the difficulty; the second and fourth represent the two opposing influences which, after twelve years of widening, finally split the Democratic party in 1860.

The second proposition above referred to is primarily untraceable, but its rounded and ultimate completion is certainly due to Calhoun. The argument for it took two directions, which may be briefly stated as follows: 1. The power given to Congress by the Constitution (Article IV., Section 3), to "dispose of and make all needful rules and regulations respecting the territory" of the United States, referred only to the territory then held by the United States, in which slavery had already been prohibited.<sup>2</sup>

This meaning was so clear at the time that a separate section was necessary to empower Congress to govern the territory thereafter to be acquired for a national capital. Plainly, then, in the cases of Louisiana, Florida, and the Mexican annexations, Congress was to govern them, not by virtue of this territorial section of the Constitution, but by virtue of the sovereign power by which it had acquired them. But Congress was itself the creature of the Constitution, and could exercise in the Territories no powers prohibited to it by the Constitution: it could not erect a State church there; or take away freedom of speech, or trial by jury; or allow any one to be deprived of property without due process of law. If, therefore, it found slave property in any of the Territories, it was constitutionally bound to legislate for the protection of this species of property, as well as of others.

This was the branch of argument intended for the country in general. Historically it is very strong, as may

<sup>1</sup> See Wilmot Proviso.

<sup>2</sup> See Ordinance of 1787.

be better seen in Taney's opinion in the Dred Scott case. Logically it is almost as strong, its radically weak point being in the definition of "property." How could Congress be said to "find slave property" in the Territories? State law or custom might create a property in man, but this could cover only the jurisdiction of the State: the State law or custom of Georgia could no more justify property in slaves in a Territory than in the sister State of New York. Slave property could not be justified by territorial law, for the Territories were under the sovereign jurisdiction of the United States; nor by that consensus of recognition by all men which justifies the holding of other animate objects as property. It could hold up absolutely no other shield than State law. Was Congress to protect every man in the Territories in the enjoyment of whatever he might see fit to claim as his property—air, sunlight, black men, or even other white men?

But the whole argument is no stronger than its weakest part, and must stand or fall with that. 2. As the Constitution was a compact between separate and sovereign States, Congress, as the joint agent and representative of the States, had no right to so legislate against slave property in the Territories as to prevent citizens of slave States from emigrating thither, since that would be a discrimination against such States, and would deprive them of their full and equal right in the Territories. This branch is elsewhere considered.<sup>1</sup> In this case it was addressed more directly to the slave States than to the country at large, and it furnishes the connecting link between the theory of State sovereignty and its practical enforcement by secession, when Calhoun's hypothetical *casus belli* had occurred.

In this point of view, Calhoun's resolutions of February 19, 1847, whose language has been used in the statement

<sup>1</sup> See State Sovereignty.

above, were the ultimatum on which the Southern States originally declared war in 1860.

The first enunciation of the fourth proposition is generally found in the Nicholson letter of Cass, December 24, 1847. In this Cass asserts that the principle of the Wilmot Proviso "should be kept out of the national legislature, and left to the people of the confederacy in their respective local governments"; and that, as to the Territories themselves, the people inhabiting them should be left "to regulate their internal concerns in their own way."

This idea was the essence of "popular sovereignty." Its advocates generally accepted the territorial section of the Constitution, above referred to, as applicable, not only to the territory possessed by the United States in 1788, but prospectively to any which might be acquired thereafter. They therefore held that Congress might make any "rules and regulations" it might deem proper for the Territories, including the Mexican acquisitions; but that, in making these rules and regulations, it was wiser and better for Congress to allow the "inchoate State" to shape its own destiny at its own will.

Properly, it will be seen, there was nothing in the dogma which could constitutionally prohibit Congress from making rules for or against slavery in the Territories, if it should so determine, though gradually Douglas and some of its more enthusiastic advocates grew into the belief that popular sovereignty was the constitutional right of the people of the Territories, which Congress could not abridge. Still, it should have been plain that, if a Democratic Congress might make a "regulation" empowering the people of the Territories to control slavery therein, a Congress of opposite views might with equal justice make a "regulation" of its own, abolishing slavery therein. This point, however, never became plain to the South until the new Republican party secured control of the House of Representatives in 1855-7.

After that time the whole South came to repudiate popular sovereignty and the territorial section of the Constitution, and rested on the Calhoun doctrine that Congress and the immigrant both entered the Territory with all the limitations of the Constitution upon them, including its provisions for the protection of slave property as well as property of other kinds.

At its first declaration, however, the idea proved to be a very taking one, South and North, for it promised to relieve the States from any responsibility for or consideration of the question of slavery in the Territories. This was to be decided by the territorial legislature, as representing the people, and by the popular convention, upon the final formation of a State constitution. The Democratic platform of 1848 did not directly refer to or indorse it, but its highly colored reference to the French Revolution of that year, and to "the recent development of this grand political truth of the sovereignty of the people and their capacity and power of self-government," was at least suggestive of the Cass doctrine of popular sovereignty in the Territories.

The suggestion was made still plainer by the convention's action in rejecting, by a vote of 216 to 36, a resolution offered by Yancey, of Alabama, recognizing "the doctrine of non-interference with the rights of property of any portion of the people of this Confederacy, be it in the States or Territories, by any other than the parties interested in them [*i. e.*, in such rights]"; the Democratic convention was not willing, therefore, to sustain the right of any slaveholder to transfer his slave property into a Territory against the will of its people.

The sudden growth of population in California in 1848-50 gave Calhoun an opportunity of fastening a nickname upon the doctrine which he opposed. No territorial government had been formed in California when it applied for admission as a State. Its inhabitants, said

Calhoun, were therefore trespassers on the public domain, mere squatters, who surely had no right on any theory to regulate their own government. His ridicule only made the terms "squatter sovereignty" and "popular sovereignty" interchangeable, though the former properly applied to an unorganized, and the latter to an organized, Territory.

The original discoverer of the doctrine of popular sovereignty in the Territories did not perfect his claim by occupation, and Douglas almost immediately became its strongest and most persistent champion, so that his name is most entirely identified with it. Henceforward the Douglas doctrine became the shibboleth of most of the Northern Democrats, as a medium between the Wilmot Proviso and the demand of many of the Southern Democrats for active congressional protection of slavery in the Territories.

It is significant, however, of the timorous and evasive statesmanship of 1850, that it is exceedingly difficult to say whether popular sovereignty was a feature in the compromise of that year.<sup>1</sup>

Southern Democrats asserted that it was not, and their claim is supported by the provisions that the legislatures of Utah and New Mexico (the only Territories organized by the compromise) should have power over "all rightful subjects of legislation consistent with the Constitution of the United States," and that its laws should be submitted to Congress, and, if disapproved, should be null and of no effect. Douglas asserted that popular sovereignty *was* the basis of the bill, and the course of proceedings on it in the Senate seems to confirm his assertion. He reported the bill in the Senate, March 25th, the powers of the Legislature being as above stated. The Committee of Thirteen reported the same bill, May 8th, adding the proviso "with the exception of African slaves."

<sup>1</sup> See Compromises.

Amendments were offered by Jefferson Davis, of Mississippi, to empower the territorial legislature to protect, but not to attack, slavery, and by Chase, of Ohio, of exactly the opposite purport.

Both were rejected; a motion of Douglas, through another Senator, to strike out the committee's exception of slavery from the powers of the Legislature, was carried by a vote of 33 to 19; and the bill passed as originally framed by Douglas.

Even with this explanation, the best that can be said of the whole arrangement is, that it was a provoking verbal juggle, meaning anything but what it appeared to mean on its face, and best calculated for citation as a precedent in two opposite senses, for an increasingly bitter wrangle over its meaning, and for the final disruption of the party which had passed it.<sup>1</sup>

In 1854 the Kansas-Nebraska bill (see that title) again purported to enforce the popular-sovereignty idea in the new Territories, although slavery had been prohibited in both of them by the Missouri Compromise of 1820. It will be noticed that its language is simple and direct until the point is reached where "popular sovereignty" was to be defined; then it becomes circumlocutory. The people were to "form and regulate their domestic institutions in their own way"; did that mean that they were at liberty either to allow or to prohibit slavery? "Popular sovereignty" and common sense said, Yes; the very Senate that passed the bill said, No; Chase's amendment, "under which the people of the Territory, through their appropriate representatives, may, if they see fit, prohibit the existence of slavery therein," was rejected, March 2d, by a vote of 36 to 10.

What other meaning than that of the Chase amendment could be given to the bill it is impossible to see, and, unless the vote above mentioned was only significant of a

<sup>1</sup> See Democratic Party.

general dislike of Chase, the popular sovereignty part of the Kansas-Nebraska bill must be set down as another verbal juggle, intended to be read in different ways, one way in the North, another way in the South.

In the meantime Calhoun's original theory had been growing in favor at the South. There the leaders were rapidly growing more dissatisfied with "non-intervention by Congress," with the idea that Congress was of itself to do nothing for or against slavery in the Territories, but was to delegate to the people of the Territories the powers which it would not or could not exercise itself.

A convention of delegates from nine Southern States at Nashville, June 2, 1850, had declared that the Federal Government had no right to decide what should be held as property in the Territories; that the slaveholding States would not submit to any restraints upon the removal of their citizens with their property to the Territories; but that, for the sake of peace, they would consent to the equitable division of the Territories by the line of 36° 30' to the Pacific. Four years afterward they assisted in carrying through the extension of popular sovereignty to *all* the Territories, by the Kansas-Nebraska bill, partly from the desire to gratify the Northern Democracy, but much more from the delusive hope that all the Territories would thus be opened to slavery.

Within two years this hope had vanished forever. It was plain that, without the reopening of the African slave trade, "popular sovereignty" in the Territories meant their inevitable final admission as free States. From the moment that this result was apparent, there was no longer any hesitation among Southern leaders. They accepted every link of the reasoning which Calhoun had forged ten years before: in the Territories neither Congress nor the territorial government could legislate against slavery; on the contrary, Congress as the agent

of the States, and the territorial governments as the agents of Congress, were bound to fulfil the essence of good government by protecting those rights of property which were recognized by the States; and popular sovereignty would only come into play when the Territory should itself become a State, and should decide whether it should be a free or a slave State.

These were the basis of the Southern demands for a platform, on which the Charleston Convention split in 1860. They had previously been accepted by the President and the official leaders of the Democratic party, and by its majority in the Senate. Douglas's non-concurrence led to his removal from the Committee on Territories in the Senate, and practically placed him out of the party fold.

Throughout all this twelve-years struggle, "non-interference by Congress" meant, in the North, that Congress was to do nothing for or against slavery in the Territories, but was to allow the people of the Territories to do as they pleased; and, in the South, that Congress was to do nothing against slavery in the Territories, either of itself or through the territorial legislatures. By dexterous manipulation of phrases the Northern and Southern Democracy had united to pass the territorial bills of 1850 and 1854, neither insisting on the full expression of its demands in words. But in 1857 the Supreme Court, in the Dred Scott case (see that title), decided against Douglas and popular sovereignty, and for the full vigor of the Calhoun theory.

Thereafter the Southern leaders, as law-abiding citizens, could of course do nothing else than amplify their previous demands into consistence with the Supreme Court's doctrine, and, further, insist upon their expression in plain terms. In the Democratic National Convention of 1856 both sections had been content with a bald approval of "non-interference by Congress with slavery in the



Territories," leaving the interpretation of this phrase undecided. In the convention of 1860 the two sections formulated their respective demands in plain terms. No manipulation of phrases could reconcile them, and the convention and the party at last divided.<sup>1</sup>

With the election of 1860, and the outbreak of the Rebellion, popular sovereignty disappeared with the evil for which it was designed to be the remedy.

The best exposition of the doctrine of "popular sovereignty" is that published by Douglas in September, 1859, as cited below. In it he insists desperately that the Dred Scott decision had not condemned his doctrine, though he admits that, if it had so condemned it, the Seward dogma would be correct, that "there is an irrepressible conflict between opposing and enduring forces, which means that the United States must and will, sooner or later, become either entirely a slaveholding nation or entirely a free-labor nation."

This belief of Douglas will account for the offer of his followers at Charleston "to abide by the decisions of the Supreme Court on questions of constitutional law." But his belief, honest as it undoubtedly was, was evidently unfounded. How can "the opinion of the court, that the act of Congress which prohibited a citizen from holding and owning property of this kind [slave property] in the territory of the United States is not warranted by the Constitution, and is therefore void," be reconciled with a power in Congress to authorize the people of the Territories to impose the same prohibition?

The court could hardly have decided against Douglas more plainly, except by naming him and his doctrine. Nevertheless, the doctrine of Douglas, that the Territories are held only for the purpose of becoming States, that they are therefore really "inchoate States," that it is wise and just to allow their inhabitants the powers of

<sup>1</sup> See Democratic Party.

self-government and "the regulation of their domestic institutions to suit themselves," is well founded, and has been the foundation of the American territorial system since 1787.

But the power of Congress, nevertheless, is always latent, and may be exercised whenever Congress, rightly or mistakenly, conceives it to be "for the general welfare" to do so. If the people of the Territory undertake to harbor anything which seems to Congress a moral evil, a lottery system, polygamy, or slavery, it is the right and duty of Congress, for the welfare not only of the future State but of all the States, to intervene and destroy it. It is a little odd that the Congresses of 1854-58, which were so quick to recognize this truth in the case of polygamy in Utah, were so slow to recognize it in the case of slavery in Kansas. Popular sovereignty in the Territories is, and has always been, a privilege, not a right; and the privilege is to be exercised in strict conformity to the terms of the grant.

**THE STRUGGLE FOR KANSAS.**—Under its present (State) boundaries Kansas is formed mainly from territory acquired by the Louisiana Purchase<sup>1</sup>; the southwest portion, lying south of the Arkansas River and west of longitude 23° west of Washington (100° west of Greenwich), was part of the territory ceded to the United States by Texas in 1850.<sup>2</sup> Under its territorial boundaries Kansas did not include this southwest portion, but extended west to the Rocky Mountains, thus taking in part of the modern State of Colorado.

The greater part of Kansas was a part of the district and Territory of Louisiana, and of the Territory of Missouri, until 1821; after that time it remained for thirty-three years without an organized government. About 1843 the increase of overland travel to Oregon led S. A. Douglas to introduce a bill in the House of Representa-

<sup>1</sup> See Annexations I.

<sup>2</sup> See Compromises, V.

tives to organize the Territory of Nebraska, covering the modern State of Kansas and all the territory north of it, in order to prevent the alienation of this overland route by treaties for Indian reservations. This bill he unsuccessfully renewed at each session until 1854, when Kansas was at last organized as a separate Territory.<sup>1</sup>

The Missouri Compromise had forever prohibited slavery in this and all other territory acquired from France north of 36° 30' north latitude; the passage of the Kansas-Nebraska bill, which provided that the Territories, when admitted as States, should be received by Congress "with or without slavery, as their constitution may prescribe at the time of their admission," began the "Kansas struggle" between free-State and slave-State immigrants for the settlement of the Territory and the control of its conversion into a State. The latter were first in the field, owing to the proximity of the slave State of Missouri. They crossed the border into the new Territory, pre-empted lands, and warned free-State immigrants not to cross the State of Missouri, which barred the straight road to Kansas. They were thus able to control the first election for delegates to Congress, November 29, 1854. A. H. Reeder, the Federal Governor of the Territory, arrived in Kansas October 7, 1854, and ordered an election for a territorial legislature to be held March 30, 1855.

Free-State immigration had already begun, in July, 1854, under the auspices at first of a congressional association called the "Kansas Aid Society," and afterward of a corporation chartered by the Massachusetts Legislature, February 21, 1855, called the "New England Emigrant Aid Company," and other similar associations. Before this evident free-State preparation could be effective the March election took place, and was carried by organized bands of Missourians, who moved into Kansas

<sup>1</sup> See Kansas-Nebraska Bill.

on election day, voted, and returned to Missouri at night. The territorial census of February, 1855, showed 2905 legal voters in the Territory; in the election of the next month 5427 votes were cast for the pro-slavery candidates and 791 for their opponents.

These figures alone, leaving aside the testimony to the terrorizing of free-State voters, will explain why the free-State settlers always refused to recognize the pro-slavery legislature as representing anything beyond a Missouri constituency.

By whatever means the election was carried, this initial success of the pro-slavery element gave it a tremendous advantage during the next two years. Its Legislature, which met at Pawnee, July 2, 1855, proceeded to make Kansas a slave Territory, adopted the slave laws of Missouri *en bloc*, with a series of original statutes denouncing the penalty of death for about fifty different offences against the system of slavery, and provided that, for the next two years, every executive and judicial officer of the Territory should be appointed by the Legislature or its appointees, and that every candidate for the next Legislature, every judge of election, and every voter, if challenged, should swear to support the Fugitive-Slave law.

The territorial Legislature had thus, as far as it was able, made Kansas a slave Territory, and guarded against any easy reversal of its action by subsequent legislatures. The free-State settlers, therefore, ignoring the territorial Legislature, took immediate steps to transform Kansas into a State, without waiting for any enabling act of Congress. California and other States had previously formed governments in this manner,<sup>1</sup> but the parallelism was denied by the Democratic Administration at Washington on the ground that no Territory had ever been, or could properly be, thus transformed into a State in

<sup>1</sup> See Territories.

direct opposition to the constituted authorities of the Territory.

The political history of Kansas, for the next few years, is therefore a series of attempts to inaugurate a State government, complicated by disobedience to territorial authorities, indictments of free-State leaders for treason, and actual armed conflict between partisans of the territorial and State governments.

In obedience to the call of a private free-State committee, a convention met at Topeka, September 19, 1855, and ordered an election for delegates to a constitutional convention. Only free-State voters took part in the election. The convention met at Topeka, October 23d, and formed the "Topeka Constitution," prohibiting slavery, which was submitted to popular vote and was adopted, December 15th, by a vote of 1731 to 46, only free-State settlers voting. An election for State officers was then held, January 15, 1856, at which a governor (C. Robinson), a representative to Congress, and a complete Legislature and State government were chosen.

The bill to admit the State of Kansas, under the Topeka constitution, was passed by the House of Representatives, July 3, 1856, by a vote of 107 to 106, but failed in the Senate. Nevertheless, on the claim that the State was already in existence,<sup>1</sup> the free-State Legislature met at Topeka, July 4, 1856. It was dispersed by Federal troops under Colonel Sumner, by orders from Washington.

This action had been foreshadowed by a proclamation of President Pierce, February 11th, in which he declared any such attempt to be an insurrection, which would "justify and require the forcible interposition of the whole power of the General Government, as well to maintain the laws of the Territory as those of the Union." It was the occasion of considerable excitement, in and out

<sup>1</sup> See State Sovereignty.

of Congress, and a provision, or "rider," was added by the Republican majority in the House to the Army Appropriation bill, forbidding the use of the army to enforce the acts of the territorial legislature of Kansas.

The Senate rejected the proviso, and during the debate the time fixed for adjournment arrived and the session of Congress closed, August 18, 1856, with the army bill unpassed. The President at once called an extra session, in which the army bill was passed without the "rider," and Congress again adjourned, August 30th.

Long before this time Kansas had become the principal topic of newspaper, political, and private discussion. The Territory itself had fairly relapsed into a state of nature, the free-State settlers disobeying and resisting the territorial government, and the slave-State settlers disobeying and resisting the State government. A desultory civil war, waged on public and private account, was marked by the murder of many individuals and by the sack of at least two cities in the free-State section, Lawrence (May 21st), and Osawatomie (June 5, 1856).

All this would have been of no more permanent interest than the early lawlessness of California, but for the premonitions which "bleeding Kansas" afforded all thinking men of the infinitely more frightful convulsion to come. The predominance of a moral question in politics, always a portentous phenomenon under a constitutional government, was made unmistakable by the Kansas struggle, and its first perceptible result was the disappearance, in effect, of all the old forms of opposition to the Democratic party, and the first national convention of the new Republican party, June 17, 1856.<sup>1</sup> Kansas, it might be said, cleared the stage for the last act of the drama, the Rebellion.

Reeder, the first territorial governor, had quarrelled with his Legislature soon after it first assembled in 1855.

<sup>1</sup> See Republican Party.

He had convened it at Pawnee City for the purpose, as was alleged, of increasing the value of his own property in that place; and when the Legislature passed an act, over his veto, to remove the capital to Shawnee Mission, he refused to recognize it as any longer a legal Legislature, and became one of the free-State leaders. At the request of the Legislature the President removed him, July 31, 1855, and appointed Wilson Shannon, of Ohio. Shannon was incompetent, and fled from the Territory in September, 1856.

The next Governor, John W. Geary, of Pennsylvania, arrived in Kansas September 9, 1856, and by a skilful blending of temporizing and decided measures succeeded in a reasonable time in disbanding most of the armed and organized forces on both sides, and in bringing about a temporary lull in the open conflict. Before the end of the year he even claimed to have re-established order in the Territory. Early in the next year he seems to have become distrustful of the sincerity of the Federal Administration in supporting him, and March 4, 1857, he resigned. Robert J. Walker, of Mississippi (a Pennsylvanian by birth), was appointed in his place. He reached Kansas May 25, 1857, and proved to be one of the most successful of the territorial governors. It must be noted, however, that his work had been much simplified by the enormous increase in the free-State immigration, which had by this time almost entirely swamped open opposition.

Nevertheless, Kansas was still governed by the nearly unanimously pro-slavery territorial Legislature, backed by the power of the Federal Government. After a final attempt of the free-State Legislature to meet at Topeka, January 6, 1857, which was prevented by the arrest of its members by the Federal authorities, the free-State party abandoned the Topeka constitution forever. Governor Walker was successful in gaining their confidence,

and succeeded in inducing them, for the first time, to take part in the election for the territorial Legislature, in October, 1857, which resulted in the choice of a free-State Legislature and delegate to Congress.

Before losing their hold of the Legislature, however, the pro-slavery party had used it to call a constitutional convention, which met at Lecompton, September 5, 1857, and adopted the "Lecompton Constitution," November 7th. It sanctioned slavery in the State, prohibited the passage of emancipation laws by the Legislature, forbade amendments until after 1864, and provided that the constitution should not be submitted to popular vote, but should be finally established by the approval of Congress and the admission of the State.

Governor Walker had repeatedly promised the free-State voters, to secure their participation in the October election, that the proposed constitution should be submitted to popular vote; the convention evaded the fulfilment of the pledge by submitting to a popular vote, December 21st, only the provision sanctioning slavery. The vote stood 6266 "for the constitution *with* slavery," and 567 "for the constitution *without* slavery," the free-State party generally declining to vote; but the new territorial Legislature passed an act submitting the whole constitution to popular vote, January 4, 1858, when the vote stood 10,226 against the constitution, 138 for it with slavery, 24 for it without slavery.

The whole question then passed into national politics, and occupied most of the next session of Congress, 1857-8. Both branches were Democratic, but no complete party majority could be secured in the House for the approval of the Lecompton constitution. The President desired and urged it; the Senate passed the necessary bill, March 23, 1858; but in the House 22 Douglas Democrats and 6 Americans united with the 92 Republicans, April 1st, to pass a substitute requiring the



resubmission of the constitution to the people of Kansas. As a compromise, both Houses passed, April 30th, the "English Bill" (so called from its mover), according to which a substitute for the land ordinance of the Lecompton constitution was to be submitted to popular vote in Kansas; if it were accepted the State was to be considered as admitted; if it were rejected the Lecompton constitution was to be considered as rejected by the people, and no further constitutional convention was to be held until a census should have shown that the population of the Territory equalled or exceeded that required for a Representative. August 3d, the people of Kansas voted down the land ordinance, 11,088 to 1788, and thus finally disposed of the Lecompton constitution.

Nevertheless, the territorial Legislature called a State convention, which met at Leavenworth and adopted a constitution, April 3, 1858, prohibiting slavery. It was ratified by popular vote, but was refused consideration by the Senate, on the ground that Kansas had not the requisite population.

The territorial Legislature directed the question of a new constitutional convention to be again submitted to popular vote in March, 1859. It was approved; the convention met at Wyandotte July 5th, and adopted the "Wyandotte Constitution," July 27th, which was ratified, October 4th, by a vote of 10,421 to 5,530.

The Senate was still a barrier in the way of the admission of Kansas, and it was not until the withdrawal of Southern Senators<sup>1</sup> had changed the party majority in that branch of Congress that Kansas was at last admitted as a State, January 29, 1861, under the Wyandotte constitution, by which slavery was prohibited.

On Kansas-Nebraska Bill see *Congressional Globe*, 33d Congress, 1st Session, 221; Greeley's *Political Text-Book*, 79; Cluskey's *Political Text-Book*, 346; 3 Spencer's *United*

<sup>1</sup> See Secession.

*States*, 504; Cutts's *Treatise on Party Questions*, 91; 2 Stephens's *War Between the States*, 241; Buchanan's *Administration*, 26; Botts's *Great Rebellion*, 147; Benton's *Examination of the Dred Scott Decision*, 156; Harris's *Political Conflict*, 155; 1 Draper's *Civil War*, 417; 1 Greeley's *American Conflict*, 224; *New Englander*, May, 1861; Giddings's *Rebellion*, 364; 2 Wilson's *Rise and Fall of the Slave Power*, 378; Cairnes's *Slave Power*, 115; Schuckers's *Life of Chase*, 134; Chase's speech, Feb. 3, 1854, Everett's Speech, Feb. 8, 1854, Douglas's Speech, March 3, 1854, in *American Orations*; Rhodes, Schouler, Burgess, Hay and Nicolay; Theodore Parker's *Speeches*, 297. The act is in 10 *Stat. at Large*, 277.

The historical authorities for the rise and fall of the idea of "popular sovereignty" in the Territories will be found under Democratic-Republican Party, V.; Republican Party, I. The Calhoun doctrine will be found in 4 Calhoun's *Works*, 339 (resolutions of Feb. 19, 1847), 535; see also Taney's opinion in Dred Scott Case; 2 Stephens's *War Between the States*, 202; and Jefferson Davis's Senate resolutions of May 24, 1860; in Greeley's *Political Text-Book of 1860*, 194. Cass's Nicholson letter in full is in Cluskey's *Political Text-Book of 1860*, 462. The Douglas doctrine is in *Harper's Magazine*, September, 1859, and in Cutts's *Treatise on Party Questions*, 123. The former article was answered by Attorney-General J. S. Black in pamphlet *Observations* on it; and the medium between the two is taken in Reverdy Johnson's *Remarks on Popular Sovereignty*. On Douglas, see Sheahan's *Life of Douglas*; Addresses in Congress on his death; 8 *Atlantic Monthly*; 103 *N. A. Review*; Wheeler's *History of Congress*, 60. H. A. Wise's *Territorial Government*, 47, 148, accomplishes the difficult feat of reaching Calhoun's conclusions from Douglas's premises.

On the Struggle for Kansas see 1 Poore's *Federal and State Constitutions*; Cutts's *Treatise on Party Questions*,

84; authorities under Kansas-Nebraska Bill ; 1 Greeley's *American Conflict*, 235; Greeley's *Political Text-Book of 1860*, 87; *Report of the House Special Committee on the Troubles in Kansas* (Republican report, pp. 1-67, Democratic report, pp. 68-109); 1 Draper's *History of the Civil War*, 409; the particulars of the "Emigrant Aid Society" are in 2 Wilson's *Rise and Fall of the Slave Power*, 465; 3 Spencer's *United States*, 514; Harris's *Political Conflict in America*, 168; Buchanan's *Administration*, 28; Cluskey's *Political Text-Book*, 346 ; Gihon's *Geary and Kansas* (generally the fairest contemporary account); Robinson's *Kansas*; Gladstone's *Englishman in Kansas*; Holloway's *History of Kansas* (1868); Wilder's *Annals of Kansas* (1875); 4 Sumner's *Works*, 127; Porter's *West in 1880*, 323; Smith, W. H., *Political History of Slavery*; Curtis, Francis, *History of the Republican Party*; Hart's *Chase*; Storey's *Sumner*; Bancroft's *Seward*.

## CHAPTER VIII

### THE DRED SCOTT CASE

**I. ORIGIN.**—In 1820 slavery was prohibited in the province of Louisiana, north of latitude  $36^{\circ} 30'$ , by the Missouri Compromise, an act of congressional legislation; in 1846–50 it was attempted to extend this congressional prohibition to all the territory acquired from Mexico; this attempt was defeated by the compromise of 1850, by which Congress refrained, and ordered the territorial legislatures to refrain, from meddling with the subject of slavery in the new Territories; and in 1854 the abrogation of the Missouri Compromise, leaving the people of each Territory to decide the question of freedom or slavery for themselves, began the Kansas struggle, which, in 1856, had gone far enough to show that free-State immigration would always overwhelm slave-State immigration in a contest of this kind.

The question of slavery had come to overshadow all others in politics, and the advocates of its extension and of its restriction had begun to exert every means to obtain control of all departments of the Government. The former held the Presidency and the Senate, while the latter, under the name of anti-Nebraska men, had just gained control of the House; the Dred Scott case, which had been in the Federal courts since 1854, was now to be the test of the affiliations of the Supreme Court.<sup>1</sup>

<sup>1</sup> See Compromises, IV., V. ; Annexations, I. ; Wilmot Proviso ; Kansas-Nebraska Bill ; Slavery ; Democratic-Republican Party, V. ; Republican Party, I.

II. FACTS.—In 1834 Dred Scott was the negro slave of Dr. Emerson, of the regular army, who took him from Missouri to Rock Island, in Illinois, where slavery was prohibited by statute, and thence, in May, 1836, to Fort Snelling, in Wisconsin, or Upper Louisiana, where slavery was prohibited by the Missouri Compromise. In 1836 Dred married Harriet, another slave of Dr. Emerson, and in 1838 Dr. Emerson, with his slaves, returned to Missouri. Here Dred, sometime afterward, discovered that his transfer by his master to Illinois and Wisconsin had made him a free man, according to previous decisions of the Missouri courts; and in 1848, having been whipped by his master, he brought suit against him for assault and battery in the State Circuit Court of St. Louis County, and obtained judgment in his favor. On appeal, the Supreme Court of Missouri, in 1852, two justices in favor and the chief justice dissenting, reversed the former Missouri decisions, refused to notice the Missouri Compromise or the constitution of Illinois, and remanded the case to the Circuit Court, where it remained in abeyance pending the argument and decision in the Supreme Court of the United States.

III. PLEADINGS.—Soon after the hearing in the State Supreme Court, Dr. Emerson sold his slaves to John F. A. Sanford, of the city of New York. On the ground that Dred and Sanford were “citizens of different States,” of Missouri and of New York, suit against Sanford for assault and battery was at once brought in the Federal Circuit Court for Missouri. Here Sanford, at the April term of 1854, pleaded to the jurisdiction of this court, on the ground that plaintiff was not, as alleged in the declaration, a citizen of Missouri, but “a negro of African descent: his ancestors were of pure African blood, and were brought into this country and sold as negro slaves.” To this plea Dred demurred, that is, claimed judgment and acknowledgment as a citizen, even

on defendant's own showing, and the demurrer was sustained. Sandford, answering over, then pleaded in bar to the action that the plaintiff was his negro slave, and that he had only "gently laid hands" on him to restrain him, as he had a right to do.

The court instructed the jury that the law was with the defendant; plaintiff excepted; and on the exception the case went to the United States Supreme Court, where it was argued at December term 1855, and again at December term, 1856, but judgment was deferred until March 6, 1857, in order to avoid any increase of the excitement already attending the presidential election.

The essential points for decision were two: 1. Had the Federal Circuit Court jurisdiction, that is, was Dred Scott a "citizen of Missouri" in the view of the Constitution? 2. If the court had jurisdiction, was its decision against Dred Scott correct?

In considering these two questions it must be remembered that Federal courts are required by the act of 1789, Section 25, to follow the statutes and constructions of the respective States wherever they come in question, unless they are in conflict with the Constitution.

IV. DECISION.—The Missouri Supreme Court had decided, on the evidence submitted, that Dr. Emerson's residence in Illinois and Wisconsin was only temporary and in obedience to the orders of his Government; that he had no intention of changing his domicile; and that, whatever might be Dred's status while in Illinois and Wisconsin, on his return to Missouri the local law of Missouri attached upon him and his servile character reintegrated. On this general ground Chief Justice Taney, with the assent of Justices Wayne, Nelson, Grier, Daniel, Catron, and Campbell (McLean and Curtis dissenting), decided that the plaintiff in error was not a citizen of Missouri in the sense in which that word is used in the

Constitution ; that the Circuit Court of the United States, for that reason, had no jurisdiction in the case and could give no judgment in it ; and that its judgment must, consequently, be reversed and a mandate issued, directing the suit to be dismissed for want of jurisdiction.

Had the Supreme Court confined its action to a denial of jurisdiction in this case on the ground taken by the Missouri State Supreme Court, the decision would probably have been accepted generally as law, however harsh, in the case of slaves removed temporarily from State jurisdiction and then brought back. But, impelled, as has been charged, by a superserviceable desire to forward the interests and designs of slaveholders in the Territories, or, as is much more probable, by the wide sweep taken by counsel on both sides in their arguments, the chief justice and the assenting justices proceeded to deliver a course of individual lectures on history, politics, ethics, and international law, the exact connection of which with the legal subject-matter in hand it was in many cases difficult for the justices themselves to make perfectly clear.

In these additions to the denial of jurisdiction lay the interest, importance, and far-reaching consequences of the Dred Scott decision. These additions were a denial of the legal existence of the African race, *as persons*, in American society and constitutional law, a denial of the supreme control of Congress over the Territories, and a denial of the constitutionality of the Missouri Compromise.

1. Sandford's plea, given above, denied the Circuit Court's jurisdiction, on the ground that Dred was of the African race, as if that necessarily implied lack of citizenship. The Circuit Court had overruled the plea, and, although this was not one of Dred Scott's exceptions, the Supreme Court reverted to the plea and sustained it.

The opinion of the court asserted that the African

race, for over a century before the adoption of the Constitution, had been considered as a subordinate class of beings, so far inferior that they had no rights which the white man was bound to respect; that they had not come to this country voluntarily, as persons, but had been brought here as merchandise, as property, as *things*; that they held that position in the view of the framers of the Constitution, and were not included in the words "people" or "citizens" in the Declaration of Independence, the Articles of Confederation, or the Constitution; and that, even when emancipated, they retained that character, and were not, nor could by any possibility ever become, citizens of the United States or citizens of a State in the view of the Constitution, capable of suing or being sued, or possessed of civil rights, except such as a State, for its own convenience and within its own jurisdiction, might choose to grant them.

Of the two dissenting justices, McLean denied, and Curtis admitted, that the plea of Sandford was properly before the Supreme Court and might be examined on writ of error; but both relied on the plain distinction between "citizens" and "electors," on the Constitution's repeated mention of negroes as "persons," and on the undoubted fact that free negroes, at the time of the adoption of the Constitution, had been not only citizens but voters in at least five of the States, and were still voters except where, as in North Carolina and New Jersey, the right to vote had been taken away by a subsequent change in the State constitution; and held that, even though free negroes might not be *electors* in any particular State, they were still always *citizens*, capable of suing and being sued, at least on the same footing with women and minors.

2. The arguments of counsel had brought up the question of the power of Congress (under Article IV., § 3, ¶ 2, of the Constitution) to "make all needful rules and



regulations respecting the territory or other property belonging to the United States."

On this point the opinion of the court held that this language, by previous decisions and the plain sense of the words, referred only to the territory and property in possession of the United States when the Constitution was adopted, and not to Louisiana and other territory afterward acquired; that the right to govern these last-named Territories was only the inevitable consequence of the right to acquire territory, by war or purchase; that Congress, therefore, had not the absolute and discretionary power to make "*all* needful rules and regulations" respecting them, but only to make such rules and regulations as the Constitution allowed; that the right of every citizen to his "property," among other things, was guaranteed by Amendment V.; that slaves were recognized as "property" throughout the Constitution; and that Congress had therefore no more right to legislate for the destruction of property in slaves in the Territories than to legislate for the establishment of a form of State religion there.

On the contrary, the dissenting opinions held that slavery was valid only by State law, and that a slave was "property" only by virtue of State law; that the Constitution was explicit on this point (as, "no person held to service or labor in one State, under the laws thereof," etc.); that the slave, when taken by the master's act out of the jurisdiction of the State law which made him a slave, at once lost his artificial character of property and resumed his natural character of a person; and that the State law could not accompany him to the Territories.

Of course this reasoning, which it seems impossible to overthrow, would necessarily have made all the Territories, south as well as north of latitude 36° 30', free soil, unless slavery should be established there by act of Congress or by popular agreement in forming State constitutions.

3. From the preceding doctrine the opinion of the court necessarily held that the act of March 6, 1820, commonly known as the Missouri Compromise, which prohibited slavery in the province of Louisiana north of latitude 36° 30' and outside of Missouri, was an unconstitutional assumption of power by Congress, and was therefore void and inoperative, and incapable of conferring freedom upon any one who was held as a slave under the laws of any one of the States, even though his owner had taken him to the Territory with the intention of becoming a permanent resident.

Mr. Justice Catron, dissenting from the majority's denial of the power of congressional legislation for the Territories, yet denied that an act of Congress could override Article III. of the Louisiana treaty of 1803, which guaranteed to the inhabitants of the ceded territory the full enjoyment of their liberty and property until States should be formed there; and also held the Missouri Compromise void, as violating the constitutional equality of citizens of the different States in their rights, privileges, and immunities.

On the contrary, the two dissenting justices held that the majority had "assumed" power to attack the Missouri Compromise; that that act was a proper instance of the power of Congress to legislate in full for the Territories, which had been exercised without question since the foundation of the Government; that it was no violation of the equality of citizens for the reasons above assigned; and that the Louisiana treaty had nothing to do with the question, since the organization of the slave States of Louisiana, Arkansas, and Missouri had embraced every slave in the entire ceded territory.

When a court has decided a question or case before it, any further remark or expression of opinion, even by the Supreme Court of the United States, on a point not legally involved, is an *obiter dictum*, of no great weight

for other courts as an authority or precedent, and of no weight at all for the public at large.

How far the voluminous opinions of the Dred Scott decision were *obiter dicta* after the denial of the Circuit Court's jurisdiction is at least doubtful. Chief Justice Taney and Justice Wayne endeavor to establish the connecting link between the denial of jurisdiction and the attack on the Missouri Compromise upon the ground of the difference between writs of error to a State court and to a Federal circuit court. In the former case the inquiry would be whether the Supreme Court had jurisdiction to review the case, and, if not, the writ would be at an end; but in the latter case the inquiry would be whether the Circuit Court had jurisdiction, and to settle this the whole case, including the merits, was open to inspection.

But the following extract from Judge Curtis's opinion deserves consideration :

“ I dissent, therefore, from that part of the opinion of the majority of the court in which it is held that a person of African descent cannot be a citizen of the United States; and I regret that I must go further, and dissent both from what I deem their assumption of authority to examine the constitutionality of the act of Congress commonly called the Missouri compromise act, and from the grounds and conclusions announced in their opinion. Having first decided that they were bound to consider the sufficiency of the plea to the jurisdiction of the circuit court, and having decided that this plea showed that the circuit court had not jurisdiction, and consequently that this is a case to which the judicial power of the United States does not extend, they have gone on to examine the merits of the case as they appeared on the trial before the court and jury, on the issues joined on the pleas in bar, and so have reached the question of the power of Congress to pass the act of 1820. On so grave a subject as this I feel obliged to say that, in my opinion, such an exertion of judicial power

transcends the limits of the authority of this court, as described by its repeated decisions and, as I understand, acknowledged in this opinion of the majority of the court. . . . A great question of constitutional law, deeply affecting the peace and welfare of the country, is not, in my opinion, a fit subject to be thus reached."

The Dred Scott decision was the last attempt to decide the contest between slavery extension and slavery restriction by form of law, and the course of events began at once to tend with increasing rapidity toward a decision by force.<sup>1</sup>

The Dred Scott decision was finally overturned by the first section of the Fourteenth Amendment, which made "all persons born or naturalized in the United States, and subject to the jurisdiction thereof," citizens of the United States, and of the State wherein they reside.<sup>2</sup>

See (I.) authorities under articles referred to. (II.) *Dred Scott vs. Emerson*, 15 *Mo.*, 682. (III.) *Dred Scott vs. Sandford*, 19 *How.*, 393; Benton's *Examination of the Dred Scott Decision*; Tyler's *Life of R. B. Taney*, 373, 578; 2 B. R. Curtis's *Works*, 310; 9 *Curtis*, 72; 1 Greeley's *American Conflict*, 251; Hurd's *Law of Freedom and Bondage*; Buchanan's *Buchanan's Administration*, 48; Giddings's *History of the Rebellion*, 402; Nott's *Slavery and the Remedy*; *Slaughter House Cases*, 16 *Wall.*, 36; and authorities under Slavery. See also *American History Leaflet*, No. 23; 2 Rhodes's *History of the United States*; Schouler's *History of the United States*, vol. v.; Hay and Nicolay's, *Life of Lincoln*; H. L. Carson's *The Supreme Court*, vol. ii., ch. xv.; von Holst, vi., ch. i.; Seward's Speech, March 3, 1858; Thayer's *Cases in Constitutional Law*; *N. Y. Nation*, July 5, 1894; Gray and Lowell, *Legal Review of the Case of Dred Scott*.

<sup>1</sup> See Secession, Slavery.

<sup>2</sup> See Civil Rights Bill; Constitution, IV.

## CHAPTER IX

### POLITICAL PARTIES, 1824-1876

**I. THE DEMOCRATIC PARTY.**—In 1824 the delusion of an era of good feeling broke to pieces. John Quincy Adams was chosen President. His electoral vote was simply a repetition of the votes of the former Federal party, with the addition of a few scattering votes in new States, and the larger part of the always doubtful vote of New York. His inaugural address, in its emphatic approbation of a system of internal improvements, would alone have forced a strict construction opposition to him; and the fact seems to be that, while the peculiar circumstances of his election were the nominal ground, the real ground of the opposition to him lay in the principles of broad construction unhesitatingly avowed and ably supported by him.

The opposition to President Adams, ending in the election of Andrew Jackson as President in 1828, was the culmination of a change in the political condition of the United States which had been proceeding for many years, but most rapidly since 1810. In the older States suffrage had always been limited by property qualifications of varying amounts; in the newer States it was given to all white male citizens over twenty-one. This change reacted upon the older States; Maryland in 1810, Connecticut in 1818, New York in 1821, and Massachusetts in 1822, either by amendments or by new constitutions, abolished their property qualifications; and in the

few States which still retained them they were now only nominal in amount or in enforcement.

The dam through which this current of democracy had burst was not so high, nor was the force of the current so strong, as to greatly endanger the electoral system, but it was sufficient in all but six States in 1824, and in every State but one in 1828, to take the choice of electors from the legislatures and to give it to the people, and it was sufficient also to make Andrew Jackson President. Benton's idea that the election of 1828 was solely a rebuke of the result of the election of 1824 is a politician's error; it does not account for the new men who swarmed into public life everywhere about that time, for the horrified disgust of the leaders of both parties at Washington at the "millennium of the minnows," "the triumphant reign of King Mob," or for the chasm which yawns between the political life of 1820 and that of 1829. The truth is, that in 1829 the people first assumed control of the governmental machinery which had been held in trust for them since 1789, and that the party and administration which then came into power was the first in our history, which represented the people without restriction and with all the faults of the people.

Both parties claimed the name of Republicans until after the election of 1828, the supporters of Adams being the "administration wing," and those of Jackson the "opposition." But the word "national" soon became a favorite addition to the titles of Adams newspapers, and passed thence to the official name of the Adams party; while the opposition, after using for a time the name of "Jackson men," soon came to assert a special title to the name of Democrat, though they still formally used the name of Republican, but never with the addition of national. The new Democratic party, when it elected Jackson, had but one controlling aim—the election of Jackson; to this political principles were

subordinate. In its ranks were included protectionists, internal-improvement men, supporters of the Bank of the United States, and men of every shade and variety of political opinion. Jackson himself, before his election, had been in no sense opposed to protection, to internal improvements, or to the bank; but after his election his drift toward a strict construction of the Constitution was hastened by the fact that all his National Republican opponents, and particularly Clay, were broad constructionists, and by the inherited and natural tendencies of his Southern supporters. Jackson's first and most urgent duty was to give tone and discipline to his party, and this he did with military precision. In the North the offices under control of the national appointing power were for the first time used as party instrumentalities, as they had been used for thirty years in New York, by the dismissal of opponents, and the appointment of supporters, of the Administration.

The new proscriptive system undoubtedly strengthened the party in the North, by attracting to it the interested services of local leaders, and, aided by the system of nominating conventions soon after introduced, it reacted upon opposing parties and compelled them to adopt it also; its evil effect, the evolution of a controlling class of small politicians, whose only trade is the production of party hatred, still waits for correction.

In the South the extreme Southern party had only supported Jackson because of the loss of their chosen leader, Crawford, but a large part of it, headed by John C. Calhoun, the Vice-President, still affected an independence which ill-suited the discipline of party, or the temper of Jackson; he therefore broke off relations with Calhoun in 1830, broke up his Cabinet in 1831, and removed the Calhoun members from it, and in 1832-3, when South Carolina undertook to make the doctrine of State sovereignty practical, he was able to apply so sud-

den and severe a pressure to the politicians of that State that they were very willing to retire from an untenable position under the cover afforded by the good nature of Congress.<sup>1</sup> For his success in this instance, however, he was much indebted to his popularity in other Southern States, due particularly to his action in Indian affairs, which left South Carolina to face him alone.

The first message of Jackson, December 8, 1829, took the strict-construction ground, which has already been noticed, upon the subject of the tariff, that it should be regulated solely with a design, 1, to obtain revenue "to pay the debts of the United States," and 2, "to provide for the common defence and general welfare" by laying duties to retaliate upon nations which protect their own manufactures, or by laying duties to protect those manufactures which are essential in war. May 27, 1830, in his veto of the Maysville road bill, the President also took the strict-construction view of the powers of Congress as to internal improvements, holding that appropriations for that purpose, if confined to local or State improvements, were unconstitutional, and, if more general or national, were usually injurious and always to be cautiously attempted.

In both these questions the theory of the party has always been in perfect harmony with Jackson's views, but its practice has very often been inconsistent, because of the difficulty of controlling the interests or feelings of individual members. Of this we find in Jackson's own case too many instances for special mention. Throughout the whole of his first term he was compelled to make unprecedented use of the veto power to defeat bills for internal improvements passed by the National Republicans with the assistance of a part of the Democrats.<sup>2</sup>

Before the first half of Jackson's first term was over, he had brought order out of the party chaos, and had

<sup>1</sup> See Nullification.

<sup>2</sup> See Veto.



re-established the party on a basis of strict construction and in a state of strict discipline, with the exception of the impracticable nullificationists of the South, who remained in opposition for about twelve years. This process had not been completed without driving from the party many voters who were only "Jackson men," not strict constructionists; but, on the other hand, it attracted a larger number of former Federalists who were not sufficiently loose constructionists to agree with the advanced doctrines of the Whigs or National Republicans, and who, therefore, fell into the Democratic party, just as many Whigs did at the formation of the Republican party in 1856.

In May, 1832, the party held its first national convention, at Baltimore, indorsed the nomination to the Presidency which several legislatures had offered to Jackson, and for the Vice-Presidency nominated Martin Van Buren, who had supplanted Calhoun in the confidence both of the President and the party. In the election of 1832 the Democratic candidates were successful, receiving 219 of the 288 electoral votes. In 1828 they had carried the entire South (except Delaware and half of Maryland's vote), the entire West (Ohio, Indiana, and Illinois), and Pennsylvania and half of New York's vote in the Middle States. In 1832 they gained Maine, New Hampshire, New Jersey, and the rest of New York's vote, and lost Kentucky, which thenceforth followed the fortunes of Clay and the Whig party.

As soon as the party had been restored to its legitimate political basis, it was inevitable that it should come into conflict with the Bank of the United States, whose charter was to expire in 1836. It was doubly bound to oppose the re-charter of the bank: 1, as a strict-construction party, it was compelled to take the views laid down by Jefferson in 1791<sup>1</sup>; and 2, as a popular party, it neces-

<sup>1</sup> See Bank Controversies, II.

sarily held that the public servants of the United States must be human beings, open to impeachment and punishment in case of misbehavior, and that the creation of a private corporation to do the duties of public servants, and to enjoy to its own profit and without interest the custody of the public funds, was wrong, unfair, and unwise, even if it were lawful.

The story of the struggle, which really began before 1832, and was a prominent feature in the presidential election of that year, is given elsewhere.<sup>1</sup> It resulted in the downfall of the bank, and the transfer of the public funds to various banks, which had been established by State charters, and were selected by the Secretary of the Treasury. The influence of these "pet banks" had largely aided in making New York Democratic in 1832, and was exerted to the same effect in 1836.

In May, 1835, the Democratic convention met at Baltimore. It again adopted, and thus made a permanent rule of Democratic conventions, the "two-thirds rule,"<sup>2</sup> which made two thirds of the votes necessary to a nomination. The pronounced favor of the President had made Martin Van Buren his destined successor, and had given him the control of the party machinery. Indeed, the extreme Southern faction took no part in the convention, relying on the nomination of Hugh L. White for President, and John Tyler for Vice-President, by Southern legislatures. The convention nominated Van Buren for President unanimously, and R. M. Johnson for Vice-President by 178 votes to 87 for Wm. C. Rives, of Virginia. No platform was adopted. In the election of 1836 Van Buren was elected by 170 votes out of 294. This year the Democratic vote was increased by that of Rhode Island and Connecticut, but lost that of New Jersey. Georgia and Tennessee voted for White, and

<sup>1</sup> See Bank Controversies, III. ; Deposits Removal of.

<sup>2</sup> See Nominating Conventions.

Virginia, by voting for Tyler, threw the election of the Vice-President into the Senate, where Johnson was chosen.<sup>1</sup>

So long as Jackson's strict construction had stopped with his war upon the bank, selfish interest and a desire to handle the public funds made the State banks, particularly those of New York, his ardent supporters; when he and his successor, Van Buren, proceeded to make the party a "hard-money" party, as its strict-construction principle dictated, he lost their support. The removal of the deposits, their transfer to the State or "pet" banks, and the "specie circular,"<sup>2</sup> were the three steps which brought on the panic of 1837. But in spite of panic, suspension of specie payments, and a clamor for governmental relief from men of all parties, Van Buren maintained his party's political principles with a steadiness which makes his one term of the Presidency altogether the brightest part of his varied career. He refused to countenance any Federal interference with the course of business, threw all his official influence into an effort for the complete "divorce of bank and state," and, after a three-years struggle, accomplished it by the establishment of the sub-Treasury system, July 4, 1840.<sup>3</sup>

This made the Federal Government the guardian of its own funds, relieved it from direct intercourse with any bank and from the need to give any bank the power to issue national paper money, and by consequence made gold and silver the only money recognized by the Federal Government.

The Democratic party, after a twelve-years novitiate, was thus at last a strict-construction party in every mooted political question. Its national convention at Baltimore, May 5, 1840, was, therefore, for the first time, ready to formulate its party principles, which it did in a platform whose principal resolutions were as follows:

<sup>1</sup> See Disputed Elections, III.

<sup>2</sup> See Bank Controversies, IV.

<sup>3</sup> See Independent Treasury.

“1. That the Federal Government is one of limited powers, derived solely from the Constitution; and that the grants of power shown therein ought to be strictly construed by all the departments and agents of the Government; and that it is inexpedient and dangerous to exercise doubtful constitutional powers. 2. That the Constitution does not confer authority upon the Federal Government to commence or carry on a general system of internal improvement. 4. That justice and sound policy forbid the Federal Government to foster one branch of industry to the detriment of another, or to cherish the interest of one portion to the injury of another portion of our common country. . . . 5. That it is the duty of every branch of the Government to enforce and practise the most rigid economy in conducting our public affairs, and that no more revenue ought to be raised than is required to defray the necessary expenses of the Government. 6. That Congress has no power to charter a United States bank; that we believe such an institution one of deadly hostility to the best interests of the country, dangerous to our republican institutions and the liberties of the people, and calculated to place the business of the country within the control of a concentrated money power, and above the laws and the will of the people. 8. That the separation of the moneys of the Government from banking institutions is indispensable for the safety of the funds of the Government and the rights of the people.”

The omitted portions refer chiefly to slavery, which is elsewhere considered.<sup>1</sup>

On this platform Van Buren was unanimously re-nominated, and the selection of candidates for Vice-President was left to the States, with the hope of throwing the election for that office into the Democratic Senate.

This platform was checkmated by the Whigs with the “hard cider and log-cabin” campaign of 1840,<sup>2</sup> based, as the Democrats indignantly alleged, on “noise, numbers,

<sup>1</sup> See Slavery.

<sup>2</sup> See Whig Party, II.

and nonsense," with a studious ignoring of political principle, and an entire reliance on the military reputation of "Tippecanoe"—in fact, quite parallel to the original Democratic campaigns of 1828 and 1832. A dexterous use of four years of panic gave the Whigs the small percentage of increase necessary to carry most of even the States which had been reliably Democratic since 1828. New Hampshire alone in New England, Virginia, South Carolina, and Alabama in the South, and Illinois, Missouri, and Arkansas in the West, were Democratic; everything else was Whig.

This result of nominating a man who had been a real party leader fixed the Democratic managers for the future to the policy of nominating subordinates, and made Polk, Pierce, and Buchanan Presidents.

About this time the Whigs began to apply the name *loco-foco* to the whole Democratic party. The original loco-focos were a faction of the New York City Democracy, which originated in a dislike to the profuse creation of State banks in New York after the downfall of the United States Bank; it was opposed to Tammany, and to the grant of special privileges to corporations by charter, and was in favor of a judiciary elected by the people, as the New York constitution of 1846 soon afterward provided.<sup>1</sup> Van Buren's course while in office, which had arrayed all the State banks against him, brought the loco-focos back to their party; and the Whigs hastened to mark their belief that the whole Democratic party was now hostile to all banks, business interests, and property, by thus making the name loco-foco general in its application. For the next five years, 1840-45, therefore, the Whig publications carefully avoided the word Democrat, and used loco-foco instead.

The Congress which was elected in 1840, and met in 1841, was Whig, but not by the two-thirds majority

<sup>1</sup> See Loco-Foco.

necessary to pass bills over the veto of Tyler, who had succeeded Harrison. It was therefore powerless to do anything further than to balk the President. The policy which the Democratic leaders followed was to preserve an official neutrality between the Whigs and the President, while individuals and unofficial assemblages of enthusiastic Democrats all over the country fed Tyler with delusive hopes of a Democratic nomination for the Presidency in 1844.

In this way the separation between the Whigs and the President was made permanent<sup>1</sup>; the Whig efforts to re-establish a national bank were frustrated<sup>2</sup>; and upon the expiration of the compromise tariff of 1833,<sup>3</sup> the Whig majority, after ineffectual attempts to pass a protective tariff, with a clause for the distribution of surplus revenue among the States,<sup>4</sup> was forced to pass the tariff act of August 30, 1842, which was sufficiently free from the principle of protection to apparently satisfy the Democrats and to do service as a party cry in the next campaign.

The first half of Tyler's administration is one of the most singular episodes in the Democratic party's history; beaten, to all appearance, overwhelmingly at the polls in 1840, it yet shaped all important legislation for the next two years to its own liking.

The party's success was not confined to its action as a minority in Congress, backed by the President; it found abundant encouragement in the State and congressional elections of 1841-3. Returning prosperity had destroyed the usefulness of the panic as a political factor, and all the States which had been Democratic after 1827, but which had voted for Harrison by small majorities in 1840, now reversed their vote; even the States of Maryland, Connecticut, and Louisiana, usually Whig, now elected Democratic State governments.

<sup>1</sup> See Whig Party, II.

<sup>2</sup> See Bank Controversies, IV.

<sup>3</sup> See Nullification.

<sup>4</sup> See Internal Improvements.

When Congress met in 1843 the Senate was still Whig by a small majority, but the House was Democratic by more than a two-thirds vote, and a Democratic Speaker was chosen without difficulty. This result, in the branch of Congress which was fresh from the people, presaged the election of a Democratic President in 1844, according to the singularly close coincidence, from 1800 until 1876, between a party's success in electing the Speaker of the even numbered Congresses and its success in the closely following presidential election.

Every sign in the political sky pointed to the early and secure possession of power by the Democratic party; and it is beyond expression discreditable to the political acuteness of Southern leaders, to the tempers of their constituents, or to both, that they should have seized this very time to force their party into a false and fatal position upon the question of the extension of slavery. If they desired to preserve slavery in the South against the growing abolitionist feeling in the North, every axiom of the economy of politics called upon them to insist upon strict construction to the full, to intrench slavery within State limits, and to trust the natural conservatism of the American people for the maintenance of constitutional boundaries. They chose, instead, to extend slavery by loose construction and then to defend the acquisition by strict construction; an error parallel with that which led to Gettysburg and the downfall of the Confederacy—the unwise assumption of the offensive by the naturally defensive party.<sup>1</sup>

Since 1830 Calhoun and his little faction of Adullamites had generally been in opposition, uniting with the Whigs at one time to oppose and censure Jackson, and again to oppose Van Buren. Their Democracy was entirely subsidiary to the maintenance of the sectional rank of the South and to the defence of slavery. In attaining these

<sup>1</sup> See Slavery.

objects they preferred, if possible, to follow the path of strict construction, but were always willing to take loose construction where strict construction was unavailable.

Before his nomination to the Vice-Presidency by the Whigs, Tyler had always belonged to the Calhoun faction, and as he became farther separated from the Whig party he began to draw upon the Calhoun faction for members of his Cabinet. In March, 1844, Calhoun himself became Secretary of State.<sup>1</sup>

The great object of the Calhoun faction, an object to which the Northern wing of the Democratic party was profoundly indifferent, and in support of which the legitimate Southern wing had hitherto been by no means united, was the annexation of Texas, and in 1844, after a skilfully managed struggle of sixteen months, the Calhoun faction, using the Tyler administration as a stepping-stone, got control of the national Democratic organization and through it committed the party to Texas annexation.

The methods of this success are by no means clear, for we have only meagre data of the composition of the convention, or of the authority and instructions of its delegates. It is certain that a majority of the delegates were pledged to vote for Van Buren, and consequently against annexation. Benton and the Van Buren leaders alleged that the Calhoun clique, by months of intrigue, induced a sufficient number of Van Buren delegates to join the annexationists in voting a continuance of the two-thirds rule, for the surreptitious purpose of defeating Van Buren and fanning "the firebrand cast into the party by the mongrel administration at Washington"; the annexationists, on the other hand, asserted that the apparent Van Buren majority was of no real value; that the Van Buren delegates, particularly from the North, were not chosen by the people, but by small State conventions of

<sup>1</sup> See Administrations.



self-appointed political managers; and that the whole New York delegation, for example, represented but nine thousand Democratic voters. Both sides were probably correct: there is nothing at all improbable or unfamiliar in either version.

The important result in this connection, however, was convention action which ultimately placed in jeopardy the basic principles of the party, and whose effects the country, as well as the party, has never, for a moment since, ceased to feel.

The national convention met at Baltimore, May 27, 1844, and the first step in its three-days session was to adopt the two-thirds rule by a vote of 148 to 118, the minority being Van Buren's real friends. On the first ballot, by force of instructions, Van Buren had 146 out of 262 votes, a majority, but not two thirds. Thence he fell and Lewis Cass rose until, on the eighth ballot, Van Buren had 104 votes, Cass 114, and James K. Polk, whose name then first appeared, 44. On the ninth ballot Polk received 233 out of 264 votes and was nominated. Van Buren's close political friend, Silas Wright, was nominated for the Vice-Presidency, in spite of Tyler's living example. He declined, and George M. Dallas, of Pennsylvania, was substituted.

The strict-construction platform of 1840 was re-adopted, with two additional resolutions against the distribution of the proceeds of land sales among the States,<sup>1</sup> and against any attacks on the veto power<sup>2</sup>; and a final resolution asserted the title of the United States to the whole of Oregon, and closed as follows: "That the re-occupation of Oregon, and the re-annexation of Texas, at the earliest practicable period, are great American measures which this convention recommends to the cordial support of the Democracy of the Union." However cleverly disguised, it is apparent that the annexation of

<sup>1</sup> See Internal Improvements.

<sup>2</sup> See Veto.

Texas, for which the Constitution afforded no warrant whatever, could only be masquerading in a strict-construction platform.

In the presidential election of 1844 the Democratic candidates were elected, and the Congress which met in 1845 was Democratic in both branches. Polk and Dallas, however, had only a small plurality of the popular vote, and a majority of the electoral votes was only obtained by the action of the Abolitionists, or Liberty party,<sup>1</sup> in withholding from Clay so many votes as to give Polk the vote of New York and Michigan and his election. The vote of Pennsylvania also was obtained by a sacrifice of party principle; for party benefit in that State, Polk avowed himself a free-trader with a leaning toward protection, and Pennsylvania was carried by the cry, "Polk, Dallas, and the [semi-protective] tariff of 1842."

The new departure of the party had apparently been very little to its real advantage from the first.

Texas was immediately made a State, and, this accomplished, the party leaders reverted to strict construction, of which Polk's messages, barring always the Texas question, are models. The first report of the new Secretary of the Treasury, December 3, 1845, recommended a tariff for revenue only, and this recommendation was adopted to the full by the tariff act of July 30, 1846, which, with the exception of a further reduction of duties in 1857, remained in force until 1861. The Sub-Treasury was re-established August 6, 1846.<sup>2</sup> The passage of internal improvement bills gave the President an opportunity for veto messages, August 3, 1846, and December 15, 1847, which form a complete digest of his party's theory and precedents on this question.

The remainder of Polk's administration was occupied in the settlement of the Oregon question, the prosecution

<sup>1</sup> See Abolition, II.

<sup>2</sup> See Independent Treasury.

of the war with Mexico, and the opening skirmishes over the disposition of the territory acquired from that country by the treaty of peace.

In these Texas was again, and more emphatically, a firebrand for the party. The Northern Democrats generally supported the Wilmot Proviso, which excluded slavery from the new territory<sup>1</sup>; the Southern Democrats were at first content with voting against the proviso, but its persistent renewal soon began to increase the number of Southern converts to the doctrine which Calhoun had for some time advanced, and which the whole Southern Democracy adopted in 1857, that the Constitution protected slavery in all the Territories, and that Congress could not interfere with slavery there.<sup>2</sup> This sectional division in the party gave little promise of success in 1848, and the large Whig majority in the House in December, 1847, added to the doubtfulness of the prospect.

The Democratic national convention met in Baltimore May 22, 1848. Lewis Cass was nominated for the Presidency on the fourth ballot by 179 votes to 38 for Levi Woodbury, of New Hampshire, and 33 for James Buchanan. For the Vice-Presidency William O. Butler was nominated on the third ballot.

The convention renewed the platform of 1840, adding to it fourteen long resolutions which gave it no additional strength; they are a mere political pamphlet, and do not need to be here given. Yancey, of Alabama, offered an additional resolution that Congress had no more power to interfere with slavery in the Territories than in the States, but this was voted down, 216 to 36. Two delegations were present from New York, the Barnburners and the Hunkers, the former being Van Buren's friends, hitherto the "regular" and controlling managers of the State Democracy, and the latter the new faction supported by the Polk administration. The convention

<sup>1</sup> See Wilmot Proviso.

<sup>2</sup> See Slavery.

admitted both, dividing the vote of the State between them, whereupon both withdrew.

The presidential election of 1848 resulted in the defeat of the Democratic candidates. This defeat was entirely due to political management; it must not be attributed to the Free-Soil vote alone, or to the slavery question, which was just on the verge of becoming, but had not yet quite become, the leading question of American politics. The party leaders had simply reckoned ill in leaving out of their calculations Van Buren, who was fighting for political existence in his State.

The conscientious Free-Soilers, out of New York, who would not in any event have voted for either Cass or Taylor, injured the Whig party most, for their vote gave Cass and Butler pluralities in Illinois, Indiana, Iowa, Maine, Michigan, Ohio, and Wisconsin; the political Free-Soilers<sup>1</sup> in New York, who had originally nominated Van Buren for President, and John A. Dix for Governor, polled 120,510 votes in the State, against 114,318 for Cass, and 218,603 for Taylor, and thus inflicted upon the Democratic party the fatal loss of New York. A union of the two factions, as in 1852, would have given the 36 votes of the State and the election to Cass by an exact reversal of the electoral votes for himself and his opponents.

The legitimate strength of parties was better shown at the same election in the choice of the House which met in 1849, where the Democrats had a slight plurality, the Free-Soilers holding the balance of power. The Senate was Democratic by nearly a two-thirds vote.

The Compromise of 1850, as afterward interpreted by the Kansas-Nebraska Bill, marks the point where the Democratic party plainly began to swerve from its historic line of development.<sup>2</sup>

<sup>1</sup> See Barnburners, Free-Soil Party.

<sup>2</sup> See Compromises, V. ; Kansas-Nebraska Bill.  
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That compromise, it is true, was only the foreordained sequence to the annexation of Texas; the Territories, Utah, New Mexico, and California, had been obtained by loose construction, and now strict construction, the denial at first of the advisability of congressional interference, and then of the power of Congress to exclude slavery from them, was to be applied to defend the acquisition. But the cardinal canon of the Democratic party<sup>1</sup> had always been to ignore in politics, as far as possible, the existence of slavery.

The most influential portion of the agricultural Northern Democracy was, indeed, in 1844, distinctly, but not aggressively, anti-slavery, determined to restrain slavery within its State limits, but equally determined not to pursue it inside of those limits.

In September, 1843, the party's national organ, *The Democratic Review*, did not fear to speak as follows: "Of black slavery we have little to say here and now. God forbid that that little should be in its justification. We deplore the existence of so extraordinary an anomaly in a country of absolute freedom in most respects, while we wait with patience the workings of an overruling Providence in behalf of our black brethren." And even so late as 1848 the Ohio Democratic State Convention declared that it "looked upon the institution of slavery in any part of the Union as an evil, and unfavorable to the full development of the spirit and practical benefits of free institutions"; and that it felt it to be a duty "to use all the power clearly given by the national compact to prevent its increase, to mitigate and finally to eradicate the evil."

Until the culmination of the Texas annexation policy it would be safe to say that the national Democratic party was composed of a Northern agricultural element which was generally unfriendly to slavery, a Northern

<sup>1</sup> See also Whig Party.

urban and commercial element which was generally indifferent on the subject, and a Southern agricultural element which was distinctly pro-slavery; and that the three elements had united into a national party because of their accord on every subject excepting slavery, which they did not regard as a necessary or proper question for political discussion or action. But the success of the Southern wing in 1844 broke this tacit compact, by bringing into the political arena a vast extent of new territory whose status as to slavery could not be settled without a political struggle.

The consequent discussion of slavery, while it alienated the Democratic anti-slavery element, compelled the party more and more to abandon its traditional policy, to appear as the half-avowed supporter of slavery extension, and thus ultimately to force the formation of a party of slavery restriction—which meant war, unless one section of the Union should change its temper or its labor system.

Before this last result could be reached, the new policy was to have a most destructive effect upon the *rationale* of the party.

Hitherto the great strength of the Democratic party had been its agricultural element; its most widely trusted leaders, from Jefferson, Macon, and Gerry down to Jackson and Silas Wright, had been engaged in agriculture; and its general supremacy in agricultural States had only occasionally been disputed through the desire for protection for special interests, such as flax and wool. But in the new prominence which the party's mistake in 1844 had led it to give to slavery over its real principles only one agricultural section, the South, had any friendly interest; and the history of these ten years is only a list of defections of Northern agricultural States from the party, beginning with Maine, Vermont, New Hampshire, Michigan, Ohio, Wisconsin, and Iowa in 1856, and ending with

the stampede of the entire West in 1860. This last loss has never since been fully recovered.

The consequences of the Compromise of 1850 were not at first apparent, and the general belief that the spirit of slavery discussion had been exorcised from politics carried the party triumphantly through the year 1852. The Taylor-Fillmore administration ended with an almost two-thirds Democratic majority in both branches of Congress.

June 1, 1852, the national convention met at Baltimore, and on the forty-ninth ballot nominated Franklin Pierce for President. The vote on the first ballot was: Cass, 116; Buchanan, 93; Douglas, 20; Marcy, 27; and 27 scattering. Buchanan rose to 104 votes on the twenty-second ballot; Douglas to 92 on the thirtieth; Cass to 131 on the thirty-fifth; Marcy to 97 on the forty-fifth; and Pierce, whose name was introduced on the thirty-fifth ballot, rose from 55 to 282 votes on the last two ballots. For Vice-President Wm. R. King was nominated unanimously on the second ballot.

The platform added a long number of resolutions to that of 1840, the only important additions being one against abridging the privilege of naturalization,<sup>1</sup> another indorsing the Compromise of 1850, and another which attempted to hush the slavery question again as follows: "That the Democratic party will resist all attempts at renewing, in Congress or out of it, the agitation of the slavery question, under whatever shape or color the attempt may be made."

In the presidential election of 1852, the Democratic candidates were successful by a small popular, and an overwhelming electoral, majority. Only Massachusetts and Vermont in the North, and Kentucky and Tennessee in the South, voted against Pierce and King; and none of these by more than three thousand majority. In the

<sup>1</sup> See American Party.

South the other States which had been hitherto usually or always Whig, Maryland, North Carolina, Florida, Georgia, and Louisiana, were now permanently Democratic; even Delaware, for the first time in her history, with the dubious exception of 1820, chose Democratic electors.

The promptness with which a majority of the Southern voters recognized and accepted the Democratic doctrine of strict construction as the only present means by which to defend slavery in the Mexican acquisition, brought pro-slavery Southern Whigs by thousands into the Democratic party, and made it progressively more pro-slavery in that section; while in the North the prevailing belief that the Compromise of 1850 was intended only to ignore the slavery question in the new Territories, Utah, New Mexico, and Arizona, to stop slavery discussion, and to restore the party's old economic principles to their paramount place in politics, retained and even increased the Democratic vote.

The seeds of the disruption of 1860 were thus planted in the opposite views with which the two sections of the party won the overwhelming victory of 1852.

The mistaken policy of 1844 still held the party in its grip, and its inevitable but unforeseen consequences began to unfold more rapidly. If a strict construction of the Constitution required that the status of slavery in the new Territories should be decided by the people of those Territories, and not by Congress,<sup>1</sup> surely this principle was equally applicable to *all* the Territories, and the action of Congress in 1820 in forever excluding slavery from the Territories north of the Missouri Compromise line<sup>2</sup> was unconstitutional and void.

The immediate consequence was that the Territories north of the Missouri Compromise line which were organized in 1854 were organized with the proviso that all

<sup>1</sup> See Popular Sovereignty.

<sup>2</sup> See Compromises, IV.



questions pertaining to slavery therein were to be left to the decision of the people residing in them.<sup>1</sup> But this was no quieting of the slavery question, no return to economic principles; it was only the evident precursor of a still greater prominence to the slavery question in the future.

The consequent dissatisfaction began to show most plainly in the congressional elections of 1854 in the Northern agricultural States, Maine, New Hampshire, Pennsylvania, New Jersey, Ohio, Iowa, Illinois, Indiana, Michigan, and Wisconsin. In 1850 these States had chosen 55 Democratic representatives to 33 opposition; in 1852, 61 Democrats to 28 opposition; in 1854, 17 Democrats to 72 opposition. Not one of these States had cast an anti-Democratic electoral vote since 1840, with the exceptions of Ohio in 1844, Pennsylvania in 1848, and New Jersey in 1844 and 1848. In New York the party had also been completely wrecked, but its misfortune there was inextricably complicated with internal Democratic dissensions. The Southern representatives were unanimous on the great question, 52 being Democrats and 37 pro-slavery Whigs or Know-Nothings.

The party was evidently making up its Northern defections by Southern Whig accessions; and their influence upon the party is further marked by a revival of the question of internal improvements.<sup>2</sup> A bill for that object was passed in 1855, but vetoed by the President.

June 2, 1856, the national convention met at Cincinnati. On the first ballot Buchanan had 135 votes, Pierce 122, Douglas 33, and Cass 5. Cass's vote did not change materially, but Pierce's vote fell and those of Buchanan and Douglas rose, until, on the sixteenth ballot, Buchanan had 168 votes, Douglas 121, and Cass 6. On the next ballot Buchanan was unanimously nominated for the

<sup>1</sup> See Kansas-Nebraska Bill.

<sup>2</sup> See Construction.

Presidency. Breckinridge was unanimously nominated for the Vice-Presidency on the second ballot.

The platform was a renewal of that of 1852, which included the original platform of 1840, with additional resolutions approving the Kansas-Nebraska Bill and the principle of popular sovereignty, and condemning the Know-Nothing movement.<sup>1</sup>

In the presidential election the Democratic candidates were successful, but the vote was of evil omen for the party. The cloud in the West had grown larger and more threatening. In that section only Illinois and Indiana were now Democratic, the former by a plurality of nine thousand and the latter by a meagre majority of two thousand; and these States, with California, Pennsylvania, New Jersey, and the entire South, made up the Democratic electoral vote.

Nor were the congressional elections much more cheering. In both branches Congress was Democratic; but the majority in the House was only attained by the almost complete unification of the ninety-six Southern votes, and by an increase from six to fifteen in the Democratic representation from Pennsylvania. In the other States specified under the immediately preceding elections there was no sign of a return to the party; indeed, five of them now sent unanimous anti-Democratic representations.

If the slavery question could now have been intermitted, and if the party could have reverted to its foundation principles, its agricultural losses might possibly have been regained; but it had now entered the rapids, and the falls were not far below.

At the opening of Buchanan's administration, in March, 1857, the struggle between free-State and slave-State settlers for the possession of Kansas had gone far enough to show that the Northern Democratic idea of popular

<sup>1</sup> See American Party.

sovereignty in the Territories was of no use to the South in view of the superior Northern power in immigration, and the whole body of Southern Democrats soon swerved off to the extremely loose construction ground, formerly held by Calhoun, that slaves were recognized as property in the Constitution, and that Congress was bound to protect property in slaves in the Territories, even against the wish of a majority of their people.

This construction, though indorsed by the decision of the Supreme Court in the Dred Scott case, was evidently one which would be extremely distasteful to the Northern Democrats, and which, if made a party tenet, would still further reduce the Northern Democratic vote. The Northern section of the party had acquiesced in Texas annexation in 1844, in the Fugitive Slave Law and the abandonment of the Wilmot Proviso in 1850, and in the application of popular sovereignty to all the Territories in 1854; but it was not to be expected that in 1857 it should confess its own dogma of popular sovereignty in the Territories to be worthless, and preach the direct opposite.

Accordingly we find Douglas and a part of the already small Northern Democratic representation in Congress in opposition to the Administration on this single question. Their scission took the form of opposition to the admission of Kansas under the pro-slavery Lecompton constitution in 1858, and they were therefore known as "Anti-Lecompton Democrats"; but the real line of demarcation lay further down and was to widen into a complete division in 1860. In the Senate Douglas was almost the only anti-Lecompton Democrat, and in this body Jefferson Davis, February 2, 1860, introduced a series of seven resolutions, which were debated until May 24th, and then passed.

Of these the most important was the fourth, which declared that neither Congress nor a territorial legislature

had power, directly or indirectly, to impair the right to hold slaves in the Territories. The vote on this resolution was 35 to 21; 28 of the majority from the South, and 7 Northern Democrats; 20 of the minority Republicans, and one Northern Democrat. The introduction of these resolutions seems to have been intended as the ultimatum of the Southern wing to the Democratic party's national convention.

The national convention met April 23, 1860, at Charleston, S. C., and on the next day elected Caleb Cushing president and appointed a platform committee of one from each State. It was also agreed that no ballot should be taken for candidates until the platform should be agreed upon. April 27th, three platforms were reported by portions of the committee, one, which may be called the Southern platform, by seventeen members; another, the Douglas platform, by fifteen members (representing all the free States but California, Oregon, and Massachusetts); and another, the Butler platform, by one member, B. F. Butler, of Massachusetts.

As finally modified in debate, the Southern platform contained seven, and the Douglas platform six, resolutions. The 3d, 4th, 5th, and 6th Douglas resolutions were the 6th, 7th, 4th, and 5th of the Southern resolutions, and included promise of protection to citizens at home and abroad, approval of a Pacific railroad and the acquisition of Cuba, and condemnation of any attempt to defeat the execution of the Fugitive Slave Law.<sup>1</sup>

The first three Southern resolutions were, in brief: 1, That slavery in a Territory could not be prohibited by Congress or by a territorial legislature; 2, that the Federal Government was bound to protect slave owners in their property in slaves in the Territories; and 3, that the right of the people to decide the question of slavery could only accrue when the Territory became a State; while

<sup>1</sup> See Personal Liberty Laws.

the first two Douglas resolutions declared, 1, that the Democratic doctrines of past years were "unchangeable," but 2, "that the Democratic party will abide by the decisions of the Supreme Court of the United States on the questions of constitutional law."

The issue between the Northern and Southern Democracy could hardly be more comprehensible or more cleanly cut. The Southern delegates were no longer Democratic; they were pro-slavery. The Northern delegates, while not yielding their popular sovereignty principle in terms, would yield to the Dred Scott decision. But this was not acceptable to Southern delegates; they wished to bind the party to the Dred Scott principle for all time to come, no matter how the composition of the Supreme Court might be affected by any future successes of the Republican party.

The Butler proposition, to simply re-affirm the platform of 1856, was voted down, April 30, by 198 to 105. The Douglas platform was then adopted by a vote of 165 to 138. The majority was a free-State vote with a few scattering votes from the border States. The minority was the slave-State vote, with California, Oregon, a majority of Pennsylvania, and a minority of Massachusetts and New Jersey.

The vote was followed, on this and the following day, by the formal withdrawal of the delegates from Alabama, Mississippi, Louisiana, South Carolina, Florida, Texas, Arkansas, Georgia, and two delegates from Delaware; all these delegates united in a separate convention. The original convention then adopted the two-thirds rule, and proceeded to ballot. On the first ballot the vote stood: Douglas, 145½; R. M. T. Hunter, of Virginia, 42; James Guthrie, of Kentucky, 35; Andrew Johnson, of Tennessee, 12; and 18 scattering.

The question now lay mainly, therefore, between a Northern or a border-State candidate. On the fifty-

seventh ballot, Douglas had 151½ votes, Guthrie 65½, Hunter 16, and 19 were scattering. The convention then adjourned, May 3d, to meet again at Baltimore, June 18th, recommending the various States to fill vacancies in the meantime.

When the convention again met, June 18th, its first business was to decide upon the claims of new delegates to admission. From some of the States whose delegates had withdrawn at Charleston contesting delegations were present, and the Douglas majority, by generally admitting Douglas delegations, particularly from Louisiana and Alabama, induced a further disruption of the convention, this time on the part of the border State delegates. The Virginia, Tennessee, North Carolina, California, and Delaware delegations, with part of the Maryland, Kentucky, Missouri, and Massachusetts delegations, withdrew from the convention, and its president, Cushing, resigned.

There were thus left in the convention but seventeen border State votes, and fifteen Southern votes (Alabama and Louisiana). A new president was at once elected and balloting was renewed. On the fifty-eighth ballot (fifty-seven ballots having been taken at Charleston), Douglas had 173½ votes, Guthrie 10, Breckinridge 5, and 3 scattering; on the fifty-ninth ballot, Douglas had 181½, Breckinridge 7½, and Guthrie 5½. On neither ballot did Douglas have two thirds of the original or full vote of the convention (303 votes), but the convention now resolved that, having two thirds of its present strength, he was nominated. Benjamin Fitzpatrick, of Alabama, was nominated for the Vice-Presidency by 198½ votes to 1; and, as he declined the nomination, the national committee nominated Herschel V. Johnson. The convention finally adjourned June 22d.

The seceders at Charleston had at once organized a separate convention, adopted the Southern platform, and adjourned to meet in Richmond, June 11th. In

Richmond they continued to meet and adjourn without doing business until the 29th. In the meantime the seceders at Baltimore organized a separate convention, June 28th, with Caleb Cushing as president, and admitted the delegates whom the Douglas convention had excluded, including some of the delegates at Richmond. By unanimous votes on the first ballot in each instance, they adopted the Southern platform, and nominated John C. Breckinridge for President and Joseph Lane for Vice-President. Their action in every respect was ratified by the fragment of the Charleston seceders still in session at Richmond. Both bodies then adjourned, and the Charleston convention, in all its branches, was over.

The charge has been made, and supported by considerable concurrent testimony, that the withdrawals from the convention, at Charleston, if not at Baltimore, were part of a concerted design to split the party, insure the election of a Republican President, and thus gain an excuse for secession. Such a design was very possibly active in the minds of some of the extreme Southern faction, but the disruption itself was most certainly the natural outcome of the party's history for sixteen years.

The Southern leaders had found their Mexican acquisition and their fundamental party principles too heavy a load to be carried together and had therefore discarded the latter; the Northern leaders, who had seen their party in the North growing weaker for eight years while assisting in slavery extension by strict construction, saw that they would be committing political suicide by following in the proposed new step of loose construction, and they therefore at last, and with an obstinacy born of personal peril, held back.

The sectional division between the two factions may be seen by an analysis of the Democratic popular vote in 1860. In the (afterward) seceding States, including Tennessee, the vote stood: Douglas, 72,084; Breckinridge,

435,392; in the other border States, Douglas, 91,441; Breckinridge, 134,289; in the North, Douglas, 1,211,632; Breckinridge, 275,092—(213,205 of this credited to the two States of Pennsylvania and California). All the electoral votes of the slave States were cast for Breckinridge, except those of Kentucky, Tennessee, and Virginia, which were given to Bell,<sup>1</sup> and those of Missouri, which were given to Douglas. With the exception of three votes in New Jersey, where a fusion ticket of electors was supported by all the anti-Republican factions, and three Douglas electors were successful, no Northern electoral votes were given to either of the Democratic candidates.

It would have been, therefore, impossible for the Democratic party, even without the disruption of the Charleston convention, to have carried the election of 1860, for the adoption of the Southern platform could not have made the Southern vote more effective, and would certainly, even if accompanied by Douglas's nomination, have still further diminished the Northern vote.<sup>2</sup>

THE REPUBLICAN PARTY was the name, 1, of the original Democratic party,<sup>3</sup> and, 2, of the most powerful opponent of the Democratic party, after 1854. In the latter case, it seems to have been assumed, in great measure, for the purpose of making use of the still lingering reverence for the name in the Northern States; and yet it seems far more appropriate to its modern than to its original claimant.

The original Republicans looked upon the Union as a democracy, whose constituent units were not persons, but States; and, hence, the name Democratic party, which they finally accepted almost to the exclusion of the name Republican, was their proper title.

<sup>1</sup> See Constitutional Union Party.

<sup>2</sup> See Republican Party.

<sup>3</sup> See Democratic Party, I.



The modern Republicans looked upon the Union as a republic of itself, apart from all the States, and able to assert the integrity of its territory against any of the States; and though, like every other American minority, they were ready upon occasion to assert the sovereignty of the States,<sup>1</sup> their essential characteristic was that belief in the political existence of the nation which has controlled their whole party history, and given them their claim to the name Republican.

From 1854 until 1861 the party was engaged in opposing the extension of slavery to the Territories. Since 1861 it has controlled the National Government, except for eight years, and has been successful in maintaining the power of the nation to suppress resistance to the laws, even when marshalled under State authority; to establish and control a system of national banks; to compel individuals to contribute money and military service to national defence in time of war, the former by the issue of legal-tender paper money, the latter by drafts; to abolish slavery; to reconstruct the governments of seceding States; to maintain and defend the security of the emancipated race against State laws; to regulate those State elections which directly influence the National Government; and to suppress polygamy in the Territories. No other political party has, therefore, exerted so enormous an influence upon the essential nature of the Government in so short a time.

But one party, the Democratic, emerged unbroken, and even increased, from the storm which was settled by the Compromise of 1850. For the next five years there were only feeble and discordant efforts to oppose it, by the Free-Soilers on the slavery question, by the Whigs on economic issues, and by the Know-Nothings on the question of suffrage.

The dominant party itself struck the sudden and sharp

<sup>1</sup> See State Sovereignty, Personal Liberty Laws.

blow which, in 1854, crystallized the jarring elements of opposition into a single party. The passage of the Kansas-Nebraska Bill (see that title), not imperatively demanded by the Southern Democracy, a quixotic adherence to party dogma by the Northern Democracy, only served to rouse a general alarm throughout the North. The summer and autumn of 1854 became an era of coalitions in most of the Northern States; and the result of the congressional elections of that year was that the "anti-Nebraska men," as the coalitionists were called, obtained a plurality in the House over the Democrats and the distinct Know-Nothings, and elected the Speaker. A few members, elected as anti-Nebraska men, turned out to be consistent Know-Nothings; the remainder, however, still controlled the House.

The elements which went to make up the new party were very various and numerous.

1. Its immediate ancestor was the Free-Soil party, which joined it bodily. Of its first leaders, Hale, Julian, Chase, C. F. Adams, Sumner, Wilmot, F. P. Blair, and Preston King of New York were of this class. Many of these, like Chase, were naturally Democrats, but had been forced into opposition to their party by its unnecessary deference to the feelings of its Southern wing.

2. But these alone could not have formed the basis of a new party. This was supplied by former Whigs, either originally anti-slavery, or forced into that attitude by the Compromise of 1850. Of this class, Lincoln, Seward, Greeley, Fessenden, Thaddeus Stevens, Sherman, Dayton, Corwin of Ohio, and Collamer of Vermont were fair examples. This element, being much the more numerous and influential, controlled the policy of the new party on other points than slavery, and made it a broad-construction party, inclined toward a protective tariff, internal improvements, and government control over banking.

3. Much less numerous was the class which, originally Whig or Democratic, had at first entered the Know-Nothing organization, but drifted into the new party as the struggle against slavery grew hotter. Of this class, Wilson, Banks, Burlingame, Colfax, and Henry Winter Davis were examples, though some of them had been Free-Soilers as well as Know-Nothings.

4. In, but not of, the new party, were the original Abolitionists, led by Giddings and Lovejoy in Congress, and Garrison and Wendell Phillips out of Congress. These were the guerillas of the party, for whose utterances it did not hold itself responsible, and who were yet always leading it into a stronger opposition to slavery.

5. A fifth class, not so numerous as the second, but fully as important from a party point of view, came directly from the Democratic party, Hamlin, Cameron of Pennsylvania, Trumbull of Illinois, Doolittle of Wisconsin, Montgomery Blair, Wm. C. Bryant of New York, and Gideon Welles of Connecticut, being examples. These, and the rank and file represented by them, brought into the new party that feeling of dependence upon the people, and of consideration for the feelings, and even the prejudices, of the people, which the Whig party had always lacked. They made the new party a popular party, as the original Democrats had made the original Republicans a popular party.

6. Last, and generally temporary in their connection, were the "war Democrats," who united with the Republicans during the war of the Rebellion, such as Andrew Johnson, B. F. Butler, Stanton, Holt of Kentucky, McClelland and Logan of Illinois, and Dix, Dickinson, Lyman Tremain, Cochrane, and Sickles of New York. Many of these dropped out again after the end of the Rebellion; though some, as Butler, Stanton, and Logan, were more permanent in their connection.

The unification of all these elements was evidently a

difficult and delicate operation, and was only made possible by the transcendent interest in the restriction of slavery; but the fortunate adoption of the name Republican, endeared by tradition to former Democrats, and not at all objectionable to former Whigs, aided materially in the work.

Wilson states that this name was settled upon by a meeting of some thirty members of the House, on the day after the passage of the Kansas-Nebraska Bill, that is, May 23, 1854; and that the leader of the meeting, Israel Washburn, of Maine, began using the term immediately as a party name. Another contemporaneous movement was in Ripon, Wisconsin, where the name was suggested at a coalition meeting, March 20, 1854, and formally adopted at the State convention in July. The first official adoption of the name is believed to have been at the convention at Jackson, Michigan, July 6, 1854. During this and the next month it was also adopted by State conventions in Maine, Ohio, Indiana, Illinois, and Iowa, and may be considered as fairly established, though it was not recognized in Congress until the beginning of the next year.

In its first year of existence the new party obtained popular majorities in fifteen of the thirty-one States, and elected eleven United States Senators and a plurality of the House of Representatives. But these successes were mainly in the West; the Eastern States, and particularly New England, resisted the entrance of the new party with tenacity, and kept up the Whig and Know-Nothing organizations through the presidential election of 1856. In December, 1855, the State committees of Ohio, Massachusetts, Pennsylvania, Vermont, Wisconsin, and Michigan issued a call for a convention at Pittsburg, February 22, 1856, to complete a national organization. This step was sufficient to show that the new party contained an element which distinguished it from the

Whig party. This convention selected a national committee, and called a national convention at Philadelphia, June 17th.

When this convention met, it was found to be a free-State body, with the exception of delegations from Delaware, Maryland, and Kentucky. The platform adopted declared the party opposed to the repeal of the Missouri Compromise, to the extension of slavery to free territory, and to the refusal to admit Kansas as a free State; it declared that the power of Congress over the national territory was sovereign, and should be exerted "to prohibit in the Territories those twin relics of barbarism, polygamy and slavery"; it denounced the Ostend Manifesto (see that title); and declared in favor of a Pacific railroad, and of "appropriations by Congress for the improvement of rivers and harbors of a national character." Nothing was said of the tariff. On the first ballot for a candidate for President, Frémont had 359 votes, McLean 196, Sumner 2, and Seward 1; and on the second ballot Frémont was nominated unanimously. On the informal ballot for a candidate for Vice-President, Dayton received 259 votes, Lincoln 110, Banks, 46, Wilmot 43, Sumner 35, and 53 were scattering; and on the formal ballot Dayton was unanimously nominated.

Frémont's nomination was intended to gratify the Free-Soil and Democratic elements of the party, to provide a popular rallying cry, "Free soil, free speech, free men, and Frémont," to present a candidate free from antagonisms on the slavery question, and thus to win votes on all sides. Dayton's nomination was the Whig share of the result. Frémont was defeated, but his defeat was a narrow one, and the votes of Illinois and Pennsylvania would have made him President. It is noteworthy that in 1860 provision was made for carrying both these States, the former by Lincoln's nomination, and the latter by a protective tariff clause in the platform.

The election of 1856 ended the party's first flood tide. The congressional elections of that year were so far unfavorable that there were but 92 Republicans out of 237 members in the Congress of 1857-9. In the development of a separate organization the coalition had sloughed off all its doubtful members, and had become fairly compacted and complete. Before the next congressional elections the disruption of the Know-Nothing organization in the Northern States, the decision in the Dred Scott case (see that title), and the Lecompton Bill, gave it recruits enough to more than balance its losses.

When the Congress of 1859 met, the "black Republican party" had become, to Southern politicians, a portentous cloud covering all the Northern sky. In the Senate it now had twenty-five members to thirty-eight Democrats; and not only were the re-elections of the few Northern Democratic Senators very doubtful, but new Republican States were almost ready to demand admission. In the House all the Northern members were Republicans, except two from California, five from Illinois, three from Indiana, one from Michigan, four from New York, six from Ohio, three from Pennsylvania, and one each from Oregon and Wisconsin, and eight anti-Lecompton Democrats, who were certain to vote against the Southern claims to the Territories.

Party contest in Congress at once assumed a virulence which it had not before been subject to. In both Houses the Republicans were charged with complicity in the Harper's Ferry rising, and in the publication of Helper's *Impending Crisis*, a recently published Abolitionist book. In the House, candidates for Speaker were nominated by the Republicans (113 in number), the Democrats (93), the anti-Lecompton Democrats (8), and the "Americans," or Know-Nothings (23). For eight weeks no candidate could command a majority. The opposition to the Republicans could not be completely united in

voting for any candidate, or in voting that any member who had indorsed Helper's book, as most of the Republican members had done, was "not fit to be Speaker of this House." Finally, the original Republican candidate, Sherman, having been withdrawn, and Pennington of New Jersey, having been substituted, he was elected, February 1, 1860, by the aid of a few "American" votes. But, despite the Speaker's election, the Republicans had no control of legislation, with the exception of the passage of a homestead bill, which was vetoed by the President.

When the national convention met at Chicago, May 16, 1860, the hopes of the party were high, its organization complete, and its character for the future determined. Its elements had been so welded together that the division lines had almost disappeared; but so far as it remained, it was certain that the old Whig element would now take the leading nomination and control the general policy of the party, while the old Democratic element would be content with the second nomination and the comfortable consciousness of familiar methods in party management. The delegates were from the free States, with the exception of the delegates from Delaware, Maryland, Virginia, and Kentucky, and a fraudulent delegation from Texas.

The platform was much like that of 1856, except that the conjunction of polygamy and slavery, peculiarly exasperating to the South, was dropped; a homestead law, and protection for domestic manufactures in arranging the tariff, were demanded; and Democratic threats of secession and disunion were denounced. For the first place on the ticket, Seward was strongly supported, and he was as strongly opposed, for the assigned reason that his anti-slavery struggle had made him an unavailable candidate; but much of the opposition to him came from the mysterious ramifications of factions in New York. On the first ballot, Seward had 173½ votes, Lincoln 102,

Cameron 50½, Chase 49, Bates 48, and 42 were scattering; on the second, Seward 184½, Lincoln 181, Chase 42½, Bates 35, and 22 were scattering; and on the third, Lincoln 231½, Seward 180, and 53½ were scattering. Before another ballot could be taken, votes were so changed as to give Lincoln 354 votes, and he was nominated. For Vice-President, on the first ballot, Hamlin had 194 votes, C. M. Clay 101½, and 165½ were scattering; on the second, Hamlin had 367 votes to 99 for others, and was nominated.

In the campaign which followed, the party employed popular methods still more effectively than in 1856. With the exception of the ignominious success of 1840, no previous party had met the Democratic party on its own ground. No appeal that could be made to the attention of the people was neglected; monster wigwams, and long processions of "wide-awakes" with torches, transparencies, and music, attracted listeners to the political speeches; and for these the party could now command at least as high an order of ability as its opponents. Its candidates obtained the votes of all the free States, except three from New Jersey, and were elected. From this time the work of the party for the next four years is told elsewhere.<sup>1</sup>

No dominant party ever passed through such a trying experience as did the Republican party during the Rebellion. Its majority in Congress was only due to the absence of Southern Representatives; and, even with this aid, its majority in the House was hardly preserved in the Congress of 1863-5. Nevertheless the management of the party was generally wise and successful. The extreme anti-slavery element was held in check; and, to secure the co-operation of the small but essential percentage of "war Democrats," the name "Union party" was adopted, and other measures of conciliation were contrived.

<sup>1</sup> See articles referred to under Rebellion.



Lincoln, in particular, was obnoxious both to the extreme radicals, who disliked his temporizing policy, and to the more timid members of the party, who feared the effects of his Emancipation Proclamation. Efforts were made to obtain the nomination of Chase, partly as a vindication of the "one-term policy," partly as a rebuke of "presidential patronage," and partly to secure a more careful management of the currency; but the Republican members of the Ohio Legislature declared for Lincoln's renomination, and this seems to have ended the Chase movement.

A more turbulent but less formidable reaction was a convention of "radical men" at Cleveland, May 31, 1864, which nominated Frémont and John Cochrane of New York, and demanded a more vigorous prosecution of the war, the confiscation of the estates of rebels, and their distribution among soldiers and actual settlers. The candidates accepted the nominations, but withdrew before the election.

In the mass of the party there was no hesitation. When the "Union national convention" met at Baltimore, June 7, 1864, Lincoln was renominated by acclamation after an informal ballot of 492 votes for him and 22 for Grant. To conciliate the war Democrats, one of their number was to be nominated for Vice-President, and the choice lay between Andrew Johnson and Daniel S. Dickinson of New York. On the first ballot Johnson had 200 votes, Hamlin 145, and Dickinson 113; but votes were at once changed to Johnson, and his nomination was made unanimous. The platform approved the unconditional prosecution of the war, the acts and proclamations aimed at slavery, the proposed Thirteenth Amendment abolishing slavery, the policy of President Lincoln, the construction of the Pacific railroad, the redemption of the public debt, and the enforcement of the Monroe doctrine in Mexico.

For a little space during the summer the constant slight checks to the national armies threw a cloud over the prospects of Republican success; but before the election a general and triumphant forward movement of the army and navy made Lincoln's election a certainty, and the war closed with the Republican party at its very high tide of success, triumphant and united.

And yet, immediately after the close of the Rebellion, the party was to undergo a more severe, because more insidious, test of its steadiness. A succession of exciting events—the assassination of President Lincoln, the offer of rewards for the chiefs of the Confederacy and their hurried flight toward the seacoast, the long funeral of the dead President, and the trial of the conspirators in the assassination—appealed directly to the wild justice of revenge; and the appeal was to be resisted, if at all, by Republican equilibrium of mind, for the opposition was almost silenced for the time. It is fair to say that the test was endured successfully, and that there was no general desire for sweeping vengeance upon the conquered. Men rather felt a strong sense of relief when the excitement subsided, business was allowed to take its wonted course again, and political problems were remanded to the Federal Government for consideration.

This sense of relief was not to be permanent. Congress was not in session until December, 1865, and in the meantime the President actively began his policy of reconstruction.<sup>1</sup> Every new expression of Southern satisfaction with "the President's policy" was a fresh stimulus to suspicion in the minds of men who had for four years been engaged in suppressing a Southern rebellion; but it was not until after the meeting of Congress that the Republicans were fully aroused to the disadvantages, and the opposition to the advantages, of the succession of a war Democrat to President Lincoln's place.

<sup>1</sup> See Reconstruction, I.

There were no important elections in 1865, and in those which were held the Republicans were everywhere successful. The resolutions of their State conventions were evidently guarded in language; expressed approval of the President's policy so far as it had been developed; but demanded "the most substantial guarantees by Congress" of the safety and rights of the Southern negroes before the seceding States should be admitted to representation. In other words, the party was not disposed to a conflict with the President, but would keep its goods as a strong man armed: it would not object to his reconstruction of the State governments, if he would not object to the passage by Congress of such acts as the Civil Rights Bill and the Freedmen's Bureau Bill (see those titles); but, at the first sign of bad faith in the President, it would strike at him and his policy with all its energy, through Congress.

It is evident now that this was the universal and deliberately formed programme of the party, and that the party was not forced into it by ultra leaders. These, on the contrary, were steadily held in check during the session of 1865-6, until the veto of the Civil Rights Bill showed the President's intention to insist on the admission of the seceding States to representation without "substantial guarantees." Even then the party majority in Congress were content with the passage over the veto of the two bills named above, and the passage of the Fourteenth Amendment, as a base of future operations; they then adjourned and left the issue between themselves and the President to the decision of the party.

The decision was promptly given. The Republican State conventions in Illinois, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, New York, Ohio, and Pennsylvania pronounced against the President's policy, and declared that reconstruction must be effected by "the law-making power of the Government."

The other Republican States were mainly silent because no State conventions were held; in not one of them was the President's policy approved. On the contrary, the approval came from the Democratic party, whose leaders united with the President's Republican and war Democratic supporters in a national convention at Philadelphia, August 14, 1866, commonly called the "arm-in-arm convention," from the manner in which the Massachusetts and South Carolina delegates entered it. In some States, as in Connecticut, the Federal office-holders openly supported the Democratic candidates, with the formal approval of the President, but the intact and vigorous Republican organizations were successful.

The result of the elections of 1866 left every State north of Mason and Dixon's line with a strong Republican majority in the legislature, and a Republican governor. Still more important, they gave the Republicans in the next Congress an unequivocal majority of all its members: 42 to 11 in the Senate, and 143 to 49 in the House. If all the Southern States had been represented by Democrats, the Republican majority would still have been 42 to 33 in the Senate, and 143 to 99 in the House; until the Southern States were represented, the Republican majority was sufficient to override the President's veto in every case, and Congress could shape legislation at its will for two years to come.

The Republican National Committee expelled its president, Henry J. Raymond of New York, and two of its members, who had taken sides with the President, and war was fairly declared. The President's utter want of tact and discretion undoubtedly made the Republican victory over him easier, but it would probably have been nearly as complete in any event. His obstinate refusal to make any terms only resulted in making the terms accorded to the seceding States more severe, and the work of reconstruction was carried out by Congress with

hardly any thought of the President, except as an obstructive.<sup>1</sup>

It has been said that the party forced its congressional majority into reconstruction, and was not forced into it by its ultra leaders. Nevertheless, it is certain that these leaders, during the struggle, used the President's denunciations of Congress to carry counteraction unnecessarily far. The President had used without scruple his powers of appointment and removal to reward his friends and punish his enemies; and the civil service was thus made an instrument of offence against the dominant party. The course of events is elsewhere detailed.<sup>2</sup> How far the impeachment was desired by the mass of the party can hardly be known. The ensuing national convention pronounced the President to have "been justly impeached for high crimes and misdemeanors, and properly pronounced guilty thereof by the votes of thirty-five Senators"; but it is still a question whether the party generally felt more regret or relief at the failure of the impeachment.

The national convention at Chicago, May 20, 1868, fully approved the reconstruction policy of Congress; declared that the public faith should be kept as to the national debt, not only according to the letter, but according to the spirit of the laws by which it was contracted, but that the rate of interest should be reduced whenever it could be done honestly; and condemned the acts of President Johnson in detail. Nothing was said of the tariff. For President, Grant was unanimously nominated on the first ballot. For Vice-President, the struggle was mainly between Wade, Colfax, Wilson, and Fenton of New York. On the first ballot, Wade had 149 votes, Fenton 132, Wilson 119, Colfax 118, and all others 124. On the fifth ballot, Colfax had 224 votes, Wade 196,

<sup>1</sup> See Reconstruction, I.

<sup>2</sup> See Tenure of Office; Impeachments, VI.

Fenton 137, Wilson 61, and all others 32. So many votes were then changed to Colfax that he had 541 to 109 for all others, and was nominated. The candidates were elected without special difficulty.<sup>1</sup>

With Grant's election the party may at last be considered homogeneous and self-existent, with no trace of borrowed traditions. Distinctions within the party, arising from former political affiliations, had disappeared. Those who still felt their influence, like Seward, Chase, Welles, Trumbull, and Doolittle, had generally dropped out during the reconstruction and impeachment struggles; and a new generation, not only of voters, but of leaders, had arisen, who knew only the tenets of the party, and were not embarrassed by former Whig, Democratic, Free-Soil, or Know-Nothing bias. Among these new men were Morton, Blaine, Garfield, Conkling, Sherman, Schurz, Edmunds of Vermont, Dawes and Hoar of Massachusetts, Morgan of New York, Frelinghuysen of New Jersey, Kelley of Pennsylvania, Bingham, Shellabarger, Ashley, and Schenck of Ohio, Chandler and Ferry of Michigan, Carpenter of Wisconsin, and Yates and Washburne of Illinois. These, and a host of others, while they had practically ousted the original leaders, retained the peculiar combination of Whig principles and Democratic methods which had resulted from the original amalgamation, and were now to show whether they could make the party a popular broad-construction party in internal administration, as well as in the suppression of slavery.

The first problem which they were to meet was the condition of the Southern States. The grant of the right of suffrage to the recently enfranchised negroes had been completed by the process of reconstruction. If it was to be maintained, it must be by the vigor of the negroes themselves in defending it, by Federal support to the

<sup>1</sup> See Electoral Votes, XXI.

reconstructed State governments in defending it, or by a constitutional amendment authorizing negroes to defend it. The first method was impracticable; if it had been otherwise, it would itself have been a full vindication of the educating influences of the system of slavery. The second method was adopted by legislation and executive action<sup>1</sup>; and the third by the passage of the Fifteenth Amendment.

In both these methods the party was practically unanimous at first; but, as the difficulties of their execution increased, those who still retained anything of former party bias were the first to grow weary of them. In addition to this, there was very much of the natural repugnance to the control of the party machinery by new leaders. The result was the "Liberal Republican bolt" of 1870-2,<sup>2</sup> in which the singular-spectacle was presented of the party contending against an opposition led by the two great towers of its strength in 1854-5, Sumner and Greeley. Indeed, the contest may almost be described as one between the mass of the party, under its new leaders, and the remnants of those who had entered the party from former organizations; and the result was decisive of the party's integral consolidation.

The national convention met at Philadelphia, June 5, 1872. Its platform reviewed the past achievements of the party; demanded the maintenance of "complete liberty and exact equality in the enjoyment of all civil, political, and public rights throughout the Union"; commended Congress and the President for their suppression of Ku-Klux disorders; and promised to adjust the tariff duties so as "to aid in securing remunerative wages to labor, and promote the growth, industries, and prosperity of the whole country." This latter paragraph was the first official announcement of protectionist doctrines since 1860, but its place had always been effectually filled by

<sup>1</sup> Ku-Klux Klan.

<sup>2</sup> See Liberal Republican Party.

the resolutions of State conventions, and by the consistent policy of the party in Congress. For President, Grant was renominated by acclamation. For Vice-President, Wilson was nominated by 364½ votes to 321½ for Colfax. The candidates were elected with even less difficulty than in 1868.

Nevertheless, there was still considerable dissatisfaction in the party. The close of Grant's first term and the beginning of his second were marked by a succession of public scandals, arising mainly from his own inexperience in civil administration and the derelictions of many of his appointees. The consequent dissatisfaction was shown by a general defeat of the party in the State and congressional elections of 1874-5.<sup>1</sup> It was checked, however, immediately, and the check has often been ascribed to the political skill of the leaders in "waving the bloody shirt," that is, in stimulating a desire for the formation of a solid North to counterbalance the solid South formed by the violent suppression of the colored vote. But a more rational commendation of their political skill may be found in the manner in which they committed their party to the payment of the public debt in coin. The issue of legal-tender paper money had been a Republican war measure, but the idea had since grown up that at least a part of the public debt should be paid in paper money.<sup>2</sup> In most of the Western States this idea had completely gained control of the Democratic party; it had made a smaller, but very considerable, progress in the Republican party; and many of the subordinate Republican politicians were inclined to look upon it as inevitable, and yield to it. So prominent a leader as Morton publicly yielded, and fathered the "rag-baby," as the paper-money idea was popularly called. To disown that which seemed at first sight their own progeny, to hazard the party's supremacy in its original habitat,

<sup>1</sup> See Democratic Party, VI.

<sup>2</sup> See Greenback-Labor Party.



the northwest, certainly required no small amount of political foresight, nerve, and skill in the Republican leaders. Ohio was made the battle ground and the gauntlet was thrown down in 1875. Success there was followed by the nomination of the successful candidate for President in 1876, and the committal of the party to specie resumption in 1879. A conflict of this nature did more to bring back the liberals of 1872, and the dissatisfied voters of 1874, than even the "bloody shirt" could do in repelling them.

The national convention met at Cincinnati, June 14, 1876. The platform differed from that of 1872 mainly in its stronger indorsement of civil service reform; in its demand for "a continuous and steady progress to specie payments"; in its denunciation of polygamy in the Territories, of "a united South," and of the Democratic party in general; and in its declaration in favor of "the immediate and vigorous exercise of all the constitutional powers of the President and Congress for removing any just causes of discontent on the part of any class, and for securing to every American citizen complete liberty and exact equality."

Much apprehension had been expressed as to President Grant's supposed intention to use the party machinery to compass his own nomination for a third term, but when the convention met he was not a candidate. The leading candidates were Conkling and Morton, representing the adherents of the administration; Bristow, representing the opposition to the administration; and Blaine, with a positive strength of his own, independent of all Southern questions. On the first ballot, Blaine had 285 votes, Morton 124, Bristow 113, Conkling 99, Hayes 61, and all others 72. On the sixth ballot, Blaine had 308 votes, Hayes 113, Bristow 111, Morton 85, Conkling 81, and all others 56. On the seventh ballot, there was a general break. Of Bristow's votes, 21 adhered to him; Blaine's

vote rose to 351; the adherents of all the other candidates transferred their votes to Hayes, and he was nominated by 384 votes out of 756. For Vice-President, Wheeler had hardly any opposition. The candidates were elected, but only after a struggle which is elsewhere detailed.

The discovery of the "cipher telegrams" helped very materially to reconcile the party to the irregularities of the election of 1876. Nevertheless, the new President was left with very little party support until the extra session of 1879. During this administration, for the first time in the party's history, the leaders failed to control its Representatives in Congress. Resumption of specie payments had been fixed for January 1, 1879. But, since 1870, silver had been steadily falling, in relative value to gold, throughout the civilized world. The act of February 12, 1873, had demonetized silver, and had made gold the only specie of the country, except for subsidiary coinage. The public debt would thus have been payable in gold alone. The idea at once spread that this action was a fraudulent effort to pay bondholders more than they were entitled to by law.

Both of the great parties yielded to the storm. After several unsuccessful efforts, the Bland bill, to make the silver dollar (then worth about ninety-two cents) a legal tender for public and private debts, and to direct its coinage at the rate of not less than \$2,000,000, nor more than \$4,000,000, per month, passed both Houses. It was vetoed, and passed over the veto by heavy majorities, February 28, 1878. In both Houses the leaders of the party voted in the negative, but the mass were either absent or in the affirmative.

The national convention met at Chicago, June 10, 1880. As Grant had been out of office for four years, his nomination was now considered unexceptionable by many, and a plurality of the delegates came to the

convention pledged to vote for him.<sup>1</sup> Blaine was next to him in strength, and Sherman, the Secretary of the Treasury, next. On the first ballot, Grant had 304 votes, Blaine 284, Sherman 93, Edmunds 34, Washburne of Illinois 30, and Windom of Minnesota 10. For thirty-five ballots this proportionate vote was hardly changed, except that on the thirty-fifth ballot, Grant's vote rose to 313, and Blaine's fell to 257. Garfield, a Sherman delegate from Ohio, had been steadily voted for by one or two delegates, since the second ballot. On the thirty-fourth ballot the Wisconsin delegation, against his protest, gave him 17 votes; on the thirty-fifth his vote rose to 50; and on the thirty-sixth, by a sudden stampede of all the anti-Grant elements, he was nominated by a vote of 399, to 307 for Grant, 42 for Blaine, 5 for Washburne, and 3 for Sherman. Arthur, to placate the Grant delegates, was nominated for Vice-President on the first ballot, by 468 votes, to 193 for Washburne, and 90 for all others.

The result of the election seems to show a very considerable party advantage in a policy of devotion to economic principles. In 1876, after eight years of a vigorous repressive policy in Southern disorders, the Republican candidates were only successful by a single electoral vote, and the honesty of the success was denied by the whole opposition party. In 1880, after four years of simple endeavor to settle the economic problems which pressed for settlement, the party's candidates were elected beyond cavil, by 214 electoral votes to 155. And further, a forged letter (the so-called Morey letter) appeared just before the election, purporting to come from Garfield, and advising the encouragement of Chinese immigration in order to bring American servants and mechanics to a more manageable condition. This forgery undoubtedly cost Garfield the five votes of California, the three votes

<sup>1</sup> See Nominating Conventions.

of Nevada, and probably the nine votes of New Jersey. Without it, the result would have been 231 to 135, and the party would have had the entire Northern and Western vote, for the first time in its history. It is also noteworthy that the prospects of possible Republican success in Southern States, without Federal coercion, date wholly from Hayes's administration.

CONSTRUCTION.—As we approach the study of the Whig party, which is generally looked upon as the lineal descendant of the Federalist party, it seems proper to consider the subject of construction. These two parties have made the construction of the Constitution an important divisive issue in politics. In a country where manhood suffrage is the rule, a written constitution would seem to be a necessity, for the purpose of securing those guarantees against the tyranny of a majority which are attained in Great Britain by limited suffrage, property representation, and Crown influence. In Great Britain, therefore, the constitution is unwritten, and practically is changed at the will of Parliament; in the United States the Constitution is written, and is changed either directly, though with great difficulty, by amendments, or indirectly and even more slowly by a stricter or broader construction, or interpretation, of its provisions. On this fundamental question of a strict or a broad construction of the Constitution, all legitimate national party differences in the United States are and always have been based; and all efforts to establish national parties without reference to it have proved failures.<sup>1</sup>

*I. Strict Construction* is the outcome of the particularist element of American politics. It is not based, however, upon any particular affection for the States as States, or upon any opposition to the Federal Government; these are its effects, not its causes. Its roots

<sup>1</sup> See Anti-Masonry; American Party, I.; Greenback-Labor Party.  
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really lie in the inertia of the mass of the people, in their unwillingness to make changes at the demand or for the sake of special interests. When this inertia had been so far overcome as to secure the establishment of the Constitution in 1789,<sup>1</sup> its next and natural expression was the principle that the Constitution should be strictly construed, and this has always been the fundamental principle of the Democratic-Republican party. It was first put into form by Jefferson and Madison,<sup>2</sup> and has since been very generally maintained by their party. The most conspicuous instances of its abandonment have been in 1844, 1858-60 (by the Southern wing), and in 1868.<sup>3</sup> The extreme particularist element has usually been marked, not so much by a strict construction of the Constitution, as by an exaggerated devotion to the States as principals, not as instruments.<sup>4</sup>

*II. Broad Construction, or Loose Construction*, of the Constitution is the necessary expression of the nationalizing, often called the centralizing, element of American politics. Its main object has always been to make the Federal Government as powerful in the internal administration of the whole country as in the management of its foreign affairs. The founder of this school was Alexander Hamilton,<sup>5</sup> whose writings are still, to a remarkable degree, a compendium of the broad-constructionist doctrines of succeeding times. The little that was lacking in his work was supplied by the Adamses, John and John Quincy; and Webster, Story, and Clay had only to complete and beautify a theory whose framework had already been strongly built. In the writings of these six men may be found all the essentials of broad construc-

<sup>1</sup> See Anti-Federal Party.

<sup>2</sup> See Bank Controversies, II. ; Kentucky and Virginia Resolutions.

<sup>3</sup> See Democratic Party.

<sup>4</sup> See State Sovereignty, Nullification, Secession.

<sup>5</sup> See Bank Controversies, II.

tion, with the exception of that which was applied to the abnormal political influences of slavery.<sup>1</sup>

As this political school has not been constant, but has been steadily developed, it follows that its supporters have been compelled to change their party name and organization as the successive phases of their doctrine have appeared, and have not been able to maintain, through all our history, an identity of name like that of their conservative opponents. Three successive parties have carried out the ideas which Hamilton first advanced. The work of the Federal party was mainly to secure the existence of the Federal Government which it had called into being. The Whig party, dropping the Federalist opposition to unlimited suffrage, accepted the mass of Federalist doctrines, and added to them those of internal improvements and a protective tariff. The Republican party, dropping the Whig opposition to agitation on the slavery question, accepted the mass of the Whig doctrines, and added to them those of the Federal Government's power to restrict slavery to State limits, to abolish slavery (as the result of civil war), to re-admit seceding States upon conditions, and to protect the slaves when set free. It has also secured the adoption of one amendment (the 15th) which seems to have opened the door to future political consequences as yet hardly to be estimated. Like the opposing school, broad construction has also its evil side; its extremists have sometimes shown a contempt for the Constitution and its limitations which would, if it prevailed, reduce the organic law to a nullity, and subject the whole country to the caprice of a shifting congressional majority.

*III. Construction in General* has always been "strict" and "loose" relatively, not absolutely. As broad construction has advanced, strict construction has advanced with it *pari passu*, so that much which is now taken as

<sup>1</sup> See Abolition, II. ; Slavery ; Reconstruction.

strict construction, would have seemed to Jefferson, or to John Taylor of Caroline, the loosest possible. The Constitution, therefore, even where it remains *ipsissimis verbis*, is in practice a very different instrument, in many important points, from that which it was in 1789. The great reason for change of construction has, of course, always been necessity or convenience; but the immediate causes are reducible to three: party tenure of power, judicial decisions, and war.

1. Whenever a broad-construction party has gained control of the Government, it has put its ideas into practice, and, when once put into practice and become familiar to the people, some of these new constructions have generally held their place and been adopted by the Democratic party on its return to power or in its efforts to do so. Thus the idea of vast and undefined indirect powers in Congress under the "general welfare" clause of the Constitution (Art. I., § 8) was adopted, 1800-12, from the overthrown Federal party; the doctrine of the power of Congress to appropriate the national funds for internal improvements was adopted, 1854-60, from the overthrown Whig party; and the slavery and reconstruction amendments and legislation were recognized and adopted, 1872-80, in the effort to overthrow the Republican party.

2. The general rule followed by the Federal courts has always been that in purely political questions the judicial department must be governed by the action of the legislative and executive. This one rule has evidently left a clear road to broad construction whenever the legislative and executive have inclined to take it. But, even in matters not strictly political, the general drift of the decisions in United States courts has been toward a broad construction. Thus, instead of the cardinal principle of the original Democratic party,<sup>1</sup> that only absolutely necessary laws were within the power of Con-

<sup>1</sup> See *Bank Controversies*, II.

gress, the Federal courts have decided that Congress may pass laws that are absolutely necessary, very necessary, or simply *necessary* in the judgment of Congress. In the same way many other powers, which were once doubtful or denied, have since been settled by the Federal courts in accordance with the broad-construction view. The Supreme Court decisions in 1879 (100 U. S.), in their interpretation and application of the 14th and 15th amendments, show that this process has by no means stopped, but is only entering a new stage of development.

3. As there is no limit to the force which may be brought against a republic in war, so there is practically no limit to the force with which the republic, if thoroughly roused, will repel it. During the Revolution the Continental authorities habitually tampered with the mails, arrested and deported, or summarily executed, suspected persons, and, wherever necessary or possible, considered State laws as practically suspended. The Alien and Sedition Laws of 1798 were defended mainly on the ground that war really existed with France. In 1812-16 the extremities to which the Federal Government was often reduced compelled the strict-construction Democratic party to resort to measures, such as conscription, impressment, naval equipment, disregard of State control of the militia, and the creation of a public debt and a national bank, which, by their own party principles, were either highly inexpedient or flatly unconstitutional.<sup>1</sup> In 1846-50, as the Mexican War was conducted outside of the country, its effects were less perceptible, but the Supreme Court's decisions on the absolute power of the Federal Government over the conquered soil of New Mexico and California were important, and were afterward used as precedents in reconstruction.<sup>2</sup> In 1861 the Southern wing of the strict-construction party not

<sup>1</sup> See Drafts, I.; Convention, Hartford; Bank Controversies, III.

<sup>2</sup> See also Territories.



only voluntarily abandoned that branch of the Federal Government, Congress, of which it had undisputed possession, to its broad-construction opponents, but even strengthened the hands of its opponents by making war on the Government, and thus bringing into play the undefined and unlimited war power. The consequence has been the enormous and now hardly questioned development of the permanent powers of the Federal Government.

The above will make it evident that construction, strict or broad, is the *vis viva* of the Constitution, which has enabled it, with very little formal change, to survive "the pressure of exigencies caused by an expansion unexampled in point of prosperity and range." By its means the law-abiding character of the American people, and their unquestioning faith in their Constitution, have both been preserved intact throughout a vast foreign immigration which has radically altered the nature and blood of the people, and each characteristic has been able reciprocally to act upon and increase the other.

See authorities cited under the articles above referred to.

ANTI-MASONRY. 1. *Anti-Masonic Party*. — The society of Free Masons was established in the United States during the eighteenth century, and before 1820 had enrolled among its members very many of the political leaders of the country. In 1826 William Morgan, of Batavia, Genesee County, New York, having prepared a book for publication which purported to expose the secrets of the fraternity, was arrested, and a judgment obtained against him for debt. Upon his release, September 12th, he was seized and conveyed in a close carriage to Niagara. No further trace of the missing man was ever found, in spite of liberal rewards offered for him or his abductors.

The affair caused intense excitement throughout West-

ern New York. Charges were made that the conspiracy to abduct embraced all the leading Free Masons of that section of the State; that these had systematically thwarted all investigation; that members of the society placed their secret obligations above those of citizenship or official duty; and that they were necessarily unfit and unfaithful public servants.

In town and county elections candidates who refused to resign their membership in the society soon found a strong, though unorganized, anti-Masonic vote against them, and in August, 1828, the National Republican party in New York carefully nominated State candidates who were not Free Masons. But an anti-Masonic State convention, at Utica, a few days later, nominated candidates pledged against Free Masonry, and polled 33,345 votes out of a total of 276,583. In 1830 they entirely displaced the National Republicans in New York, as the opponents of the Democrats, and as Jackson, the Democratic leader, was a Free Mason, steps were taken by his opponents to extend the anti-Masonic organization to other States, in hopes of thus gaining the small percentage of votes necessary to defeat the Democrats in the national election. The attempt was a failure, in one sense, since the number of National Republican Free Masons who were alienated to the democracy more than counterbalanced the anti-Masonic accession; but it resulted in the establishment of the anti-Masons as the controlling anti-Democratic organization in Pennsylvania and Vermont, and as a strong local party in Massachusetts and Ohio.

In the State of New York, William H. Seward, Millard Fillmore, and Thurlow Weed first appeared in politics as anti-Masonic leaders.

In February, 1830, a State convention at Albany had decided in favor of a national anti-Masonic nominating convention, and this decision was confirmed by a national

convention, in September, 1830. John Quincy Adams had already lost control of the National Republicans, and Clay had begun to develop some of that popularity with the party which afterward made the Whigs almost a distinctive Clay party. In the hope of forcing Clay, who was a Free Mason, out of the field, the anti-Masons held their convention first of the parties, at Baltimore, in September, 1831, and nominated William Wirt, of Maryland, and Amos Ellmaker, of Pennsylvania, as presidential candidates. The National Republicans, however, persisted in nominating Clay, and Wirt and Ellmaker received the electoral vote of Vermont alone.

The anti-Masons made no further effort to act as a distinct national party, and the rise of the Whig party soon after absorbed their organization, except in Pennsylvania, where they retained existence in alliance with the Whigs until about 1840, and in 1835, through Democratic dissensions, succeeded in electing their candidate for Governor, Joseph Ritner. But while acting as a part of the Whig party, the anti-Masonic element was sufficiently strong and distinct to force the nomination of Harrison, in 1835 and 1839, instead of Clay.<sup>1</sup>

The anti-Masons and the American party have been the only instances in our political history of an attempt to form a national political party not based on some controlling theory as to the proper construction of the Constitution.

2. *American Party*.—In 1868 a national convention, at Pittsburgh, formed the National Christian Association, which has held annual meetings since. In 1875 this body began political action as the American party. It is opposed to Free Masonry as false religion and as false politics, and demands the recognition of God as the author of civil government, and the prohibition of oath-bound secret lodges as acknowledging supreme allegiance to

<sup>1</sup> See Whig Party.

another government than that of the United States. The vote of the party was in 1876 and 1880 included in the few thousand votes classed as "scattering." Its newspaper organ is *The Christian Cynosure*, published in Chicago, Illinois, and one of its recent leaders is President J. Blanchard, of Wheaton College, Illinois.

**THE WHIG PARTY.**—From 1801 until after the presidential election of 1828 the unity of the Democratic or Republican party was still nominally unbroken. Membership in it was so essential to political advancement that after 1817 all national opposition to it came to an end. In 1824 the nomination of presidential candidates by a congressional caucus was urged on the ground that all the aspirants belonged to the same party; and, even through John Quincy Adams's administration, the "Adams and Clay Republicans," who supported the President, and the "Jackson Republicans," who opposed him, steadily acknowledged each other's claim to the party name.

Notwithstanding this superficial unity, there had long been a departure from the original Democratic canons, and a break in the dominant party, which first becomes plainly visible after the War of 1812. The idea that the people were to impose their notions of public policy upon their rulers, and not altogether to receive them from their rulers, which the Federalists had always detested at heart, had now been accepted by all politicians; but, working under this limitation, a strong section of the dominant party now aimed at obtaining, by Jefferson's methods, objects entirely foreign to Jefferson's programme. This was particularly the case in the Northern States, where commerce, banking, and the other interests, not bounded by State lines, on which Hamilton had depended for the building up of nationality, were now supplemented by another, manufactures, non-existent in Hamilton's time.

All these looked to the Republican party for a support

and protection which the *laissez faire* of the Jeffersonian theory would have refused them. It is, then, very significant of the Republican drift that banking was recognized by a national bank in 1816, commerce by a great system of public improvements in 1821, and manufactures by a slightly protective tariff in 1816, strengthened in 1824 and 1828.<sup>1</sup>

But this was the Federalist policy, with the new feature of a protective tariff, which was at least rudimentary in the Federalist policy; and the principal difference between the Federalists and the Adams Republicans was, that the former intended to be the guides, and the latter the exponents, of the people in carrying out the policy specified. The election of Adams as President in 1824, with his appointment of Clay as Secretary of State, long denounced as a guilty bargain, was really the organization of a party, and the work was only hindered by Clay's angry denials of a "bargain."

A frank acknowledgment of party birth, with the complete formulation of its principles which was given by President Adams in his annual messages, would have brought an intelligent support; the attempt to retain Jefferson's party name for the Adams faction only served to call attention to their complete departure from Jefferson's theory, and thus repelled every voter to whom "Republicanism" was still the touchstone of politics.

It was not until toward the end of Adams's term of office that any of his followers began to take the step which should have been taken at first, and assumed the name of "National Republicans." Even when it was assumed, the assumption was only tentative, and was confined to a few Northern and Eastern newspapers. To the mass of the Adams party the struggle still seemed to be only one between two wings of the same party, and the result of the election of 1828 showed which of the

<sup>1</sup> See Bank Controversies, III. ; Internal Improvements ; Tariff.

two seemed the better "Republicans" to the country at large.

Adams's electoral vote was that of the old Federal party, the vote of the New England States, New Jersey and Delaware, sixteen of New York's thirty-six votes, and six of Maryland's eleven votes. But the popular vote showed a wider strength than the Federalists had ever had. Jackson's majority was but 508 out of 8702 votes in Louisiana, a State whose sugar-planting interest was always to incline it toward a protective tariff; 4201 out of 130,993 votes in Ohio, where New England immigration and ideas were strong; in North Carolina and Virginia thirty per cent. of the popular vote was for Adams; and his total popular vote, in spite of the practical unanimity of most of the Southern States, was 509,097 to 647,231 for Jackson. This was at least an encouraging growth for a party which as yet aimed at a total reversal of the Republican policy while retaining the Republican name.

The year after Jackson's inauguration was one of sudden political quiet. The newspapers of the year were busied mainly with internal improvements, the first struggle of the railroad toward existence, and the growth of manufactures. It was not until the beginning of the year 1830 that Jackson's drift against the bank, the protective tariff, internal improvements, and the other features of the Adams policy, became so evident that his opponents were driven into renewed political activity.

The name "National Republican" at once became general. But the new party was at first without an official leader. In October, 1828, an indiscreet or treacherous Virginia friend of Adams had obtained from Jefferson's grandson and published a letter from Jefferson, written three years before, which named Adams as the authority for the allegation of a Federalist secession scheme in 1808.<sup>1</sup> Adams's newspaper organ, the *National Intelli-*

<sup>1</sup> See Embargo, Secession.

*gencer*, at once confirmed Jefferson's statement, with some corrections, and asserted that the President had known in 1808, "from unequivocal evidence, although not provable in a court of law," that the Federalist leaders aimed at "a dissolution of the Union and the establishment of a separate confederation." The former Federalist leaders of Massachusetts, or their sons, at once demanded his evidence, which he refused to give, and the quarrel died away in mutual recriminations.

Adams's purpose seems to have been to emphasize his own original "Republicanism"; but he only succeeded in alienating from himself the legitimate successor of the Federal party. His inability to see that he had created a new party cost him the party leadership, which passed at once to Henry Clay. Adams was out of politics, and, when he entered the House again, in December, 1831, came as an anti-Masonic representative; Clay, when he entered the Senate in the same month, came as the most conspicuous advocate of the Adams policy. December 12, 1831, the National Republicans, in convention at Baltimore, unanimously nominated him for the Presidency, and John Sergeant for the Vice-Presidency.

No platform was adopted, but an address to the country formulated the party principles very distinctly in its attacks on Jackson's policy. May 7th following, a "Young Men's National Republican Convention" met at Washington, renewed the nominations, and adopted ten resolutions indorsing a protective tariff, a system of internal improvements, the decision of "constitutional questions" by the Supreme Court, and a cessation of removals from office for political reasons.

The popular vote of 1832 was proportionally very similar to that of 1828; but the electoral vote was very different. Maine, New Hampshire, and New Jersey were now Democratic; the "unit system" in New York gave the whole vote of that State to Jackson; Vermont gave

her votes to the anti-Masonic candidates; and the result gave Jackson 219, Clay 49, and others 18.

Something was evidently lacking. Support of the United States Bank<sup>1</sup> helped the party in the Middle and Eastern States, but worked against it in the South and West. Support of a protective tariff helped the party in the Middle and Eastern States, where manufactures flourished, and growers of wool, flax, and hemp desired a market in their own neighborhood, but again it exerted an unfavorable influence in the South and West.

Too impatient to trust to time and argument for a natural increase of their national vote, and hardly willing to trust to a general system of purchase by "internal improvements" alone, the National Republicans began, after the election of 1832, a general course of beating up for recruits, regardless of principle, which was the bane of their party throughout its whole national existence. No delegate could come amiss to their conventions: the original Adams Republican, the nullifier of South Carolina, the anti-Mason of New York or Pennsylvania, the State-rights delegate from Georgia, and the general mass of the dissatisfied everywhere, could find a secure refuge in conventions which never asked awkward questions, which ventured but twice (in 1844 and 1852) to adopt a platform, and which ventured but once (in 1844) to nominate for the Presidency a candidate with any avowed political principles.

The National Republicans formed a party with principles and the courage to avow them; their reckless search for recruits placed their principles at the mercy of their new allies, and the bed became "shorter than that a man could stretch himself on it, and the covering narrower than that he could wrap himself in it."

However heterogeneous was the mass of dissatisfaction in 1833-4, there was community of feeling on at least

<sup>1</sup> See Bank Controversies, III.



one point, dislike to the President. In South Carolina, nullification (see that title) had received its death-blow from the President's declared intention to usurp, as the nullifiers believed, the unconstitutional power to make war on a sovereign State; and the bitterness of this feeling was aggravated in the case of their leader, Calhoun, by a preliminary personal dispute with the President.

The nullifiers were thus ready and willing to become the allies of the National Republicans; and it is asserted by Hammond that Clay's compromise tariff of 1833, which gave the nullifiers a road of retreat, was one consideration for the alliance. The anti-Masons of the Northern and Eastern States<sup>1</sup> had failed to make any impression in the election of 1832, and in transferring their national allegiance it was easier for them to go to the National Republicans, whose leader, Clay, had publicly declared that he had not attended a Masonic meeting for years, than to the Jackson party, whose leader was a warm and avowed Free Mason.

In the South, particularly in Tennessee and Alabama, many Democrats disliked Van Buren as the predestined successor of Jackson. Their leader was Hugh L. White, and, though his candidacy was at first that of a revolting Democrat, his supporters soon came to feel that they were also fighting against the President and his dictation of his successor. In Georgia, the State-rights, or Troup, party, which had ousted the Indians from the State, had really been assisted by Jackson, and opposed by Adams, in accomplishing their purpose. Nevertheless, as a sort of connecting link between the nullifiers and the White party, they became the anti-Jackson party of their State, though their entrance to the general alliance was not perfected until 1835-7.

All these elements, indeed, remained in nominally separate existence throughout the year 1833, though

<sup>1</sup> See Anti-Masonry.

their approach was daily becoming closer. Jackson's removal of deposits from the United States Bank, October 1, 1833, in defiance of a previous adverse vote of the House,<sup>1</sup> seemed to the entire opposition such a flagrant executive usurpation of power as could not escape popular condemnation, and the National Republican leaders seized upon it as an opportunity for cementing their new alliances.

The task seemed difficult, in view of the radically different political beliefs of the two leading elements of the alliance, and it was only made possible by the personal character of the opposition to Jackson, and by the political tact of James Watson Webb, of New York, in finding an available party name. His newspaper, the *Courier and Enquirer*, had originally supported Jackson, and had been driven into the opposition by the President's course. In February, 1834, he baptized the new party with the name of "Whig," with the idea that the name implied resistance to executive usurpation, to that of the Crown in England and in the American Revolution, and to that of the President in the United States of 1834.

In reality, the objects of the name were to oppose a verbal juggle to the verbal juggle of the opposite party, to balance the popular name of Republican or Democrat by the popular name of Whig, and to give an apparent unity of sentiment to fundamental disagreement. In all these it was successful. The name "took." Within six months the anti-Masons and National Republicans had ceased to be, and the Whigs had taken their places. In the South the change was slower. It was not until after the election of 1836, in which White was unsuccessful, that the White and Troup parties fairly took the name of Whigs; and in South Carolina the nullifiers in general never claimed the name, and at the most only allowed Whigs elsewhere to claim them as members of the party.

<sup>1</sup> See Deposits, Removal of.

In 1836 the party was entirely unprepared for a presidential contest. Harrison was nominated for the Presidency, as a "people's candidate," by a great number of mass meetings of all parties, and, in December, 1835, by Whig and anti-Masonic State conventions at Harrisburg, and by a Whig State convention at Baltimore, the former naming Granger and the latter Tyler for the Vice-Presidency. Harrison's politics were of a Democratic cast, but he satisfied the Whig requisite of opposition to the President, while he satisfied the anti-Masonic element still better by declaring that "neither myself nor any member of my family have ever been members" of the Masonic order.

Webster was nominated in January, 1835, by the Whig members of the Massachusetts Legislature, but he found little hearty support outside of his State. White had now gone so far in opposition that copies of the official *Washington Globe*, containing bitter attacks upon him, were franked to the members of the Tennessee Legislature by the President in person.

The Legislature, however, in October, 1835, unanimously re-elected White Senator, and by a vote of 60 to 12 nominated him for the Presidency. Soon afterward, the Alabama Legislature, which had already nominated White, rescinded the nomination, having become Democratic. The South Carolina element, having control of the Legislature, by which electors were to be appointed, made no nominations, and finally gave the State's electoral vote to Willie P. Mangum, a North Carolina Whig, and John Tyler, a nullifier.

All the factions of the opposition thus had their candidates in the field, and at first sight their discordant efforts might have seemed hopeless. But all the politicians of the time expected a failure of the electors to give a majority to any candidate, and a consequent choice by the House of Representatives, in which the opposition,

though in a numerical minority, hoped to control a majority of States. These forecasts proved deceptive. Van Buren received a majority of the electoral votes, and became President.

Van Buren's whole term of office was taken up by the panic of 1837, the subsidiary panic of 1839, and the establishment of the Sub-Treasury system in 1840, to take the place of the national bank and complete a "divorce of bank and State." Seldom have so many alternations in political prospects filled a Presidential term.

In 1837 Van Buren entered office with an overwhelming electoral majority, and his opponents prostrate before him; and within two years the Whigs "had the Loco-Focos at their mercy." So poor had the Administration grown that Calhoun and his followers ranged themselves with it again, holding that the Executive was now so weak as to be harmless, and that the real danger was from the Whigs. Preston, of South Carolina, and John Tyler, were almost the only leading nullifiers who nominally remained Whigs. To balance this, the White and Troup party had now come into the Whig ranks, the former bringing John Bell as its most prominent leader, and the latter John M. Berrien, John Forsyth, Thos. Butler King, Alexander H. Stephens, and Robert Toombs.

Before 1840 returning prosperity had changed the scene. The Democrats were now more than confident: they predicted the dissolution of the Whig party, and declared that they would be satisfied with nothing less, with no mere victory; and, to crown the whole, they were completely defeated in the presidential election of 1840 by the "moribund" Whig party.

In the accomplishment of this sudden victory, the Whig leaders have been reproached with an entire sacrifice of principle to availability, but it is well to remember that their party was as yet no complete vessel, but rather

a raft, composed of all sorts of materials, and very loosely fastened together.

Of the opposition candidates who had been in the field in 1836 it was evident that Harrison was the only available candidate for 1840. The Whig party was not homogeneous enough to take its real leader, Clay, or its perhaps still better representative, Webster; nor had it sunk so low in its own coalition as to take a real Democrat like White. Harrison was the favorite of the anti-Masonic element; his Western life and military services gave him strength at the West, and, in a less degree, at the South; and it was possible in the North and East to keep his very doubtful attitude as to the establishment of a new national bank under cover, while laying special stress on his determination to respect the will of the people's Representatives in Congress, and to spare the veto. This last point decided his nomination, for the Whig leaders saw that his name would bring votes, while under cover of it the real contest could be carried on for Congressmen, the actual governing power under Harrison's proposed disuse of the veto.

And yet it is plain now that the Whig party was more homogeneous in 1840 than it thought itself, and that it had a "fighting chance" of success under Clay. Its leaders ought to have learned this, if from nothing else, from the desperate expedients to which they were driven in the effort to dragoon the convention into nominating Harrison.

And never was another convention so dragooned. It met at Harrisburg, December 4, 1839, and was treated as a combustible to which Clay's name might be the possible spark. By successive manoeuvres it was decided that a committee of States should be appointed; that ballots should be taken, not in convention, but in the State delegations; that in each delegation the majority of delegates should decide the whole vote of the State; that the re-

sult of each ballot should be reported to the committee of States; and that this committee should only report to the convention when a majority of the States had agreed upon a candidate. The first ballot gave Clay 103 votes, Harrison 94, and Scott 57, and it was not until the fifth ballot that the committee of States was able to report the nomination of Harrison by 148 votes to 90 for Clay and 16 for Scott. In the same fashion Tyler was nominated for the Vice-Presidency on the following day.

The "campaign of 1840" was based entirely on Harrison's popularity and the general desire for a change, and under cover of these the Whigs carried on a still hunt for Congressmen, the real objects of the campaign. In all points they were successful. Log cabins and hard cider, supposed to be typical of Harrison's early life, were made leading political instruments; singing was carried to an extent hitherto unknown; mass meetings were measured by the acre, and processions by the league; and in November "Tippecanoe and Tyler, too," received 234 electoral votes to 60 for their opponents, and were elected. The popular vote was nearly evenly balanced. The Whigs had carried New England (except New Hampshire), New York, New Jersey, Pennsylvania, Maryland, Delaware, Ohio, Indiana, and Michigan, north of the Potomac; and south of it they had carried the "White and Troup party" States, Tennessee, Mississippi, and Georgia, the Whig States, Kentucky, North Carolina, and Louisiana, and had made an exceedingly close contest in Virginia, Arkansas, Missouri, and Alabama.

Evidently, the conjunction of Harrison and Tyler had kept all the elements of the opposition well in hand. More important still, the new Congress, to meet in 1841, had a Whig majority in both Houses, though the majority was not sufficient to override a veto.

In spite of its diversity of opinion, the party had now developed a number of able leaders, Clay and Webster at

their head, who for the next half-dozen years were fast giving their party a definite policy, very similar to that of its most valuable element, the former National Republicans. Among these were: Evans, Kent, and Fessenden, of Maine; Slade, Collamer, and George P. Marsh, of Vermont; J. Q. Adams, Winthrop, Choate, Everett, John Davis, Abbott Lawrence, and Briggs, of Massachusetts; Truman Smith, of Connecticut; Granger, Fillmore, Seward, Spencer, N. K. Hall, Tallmadge, Weed, and Greeley, of New York; Dayton, of New Jersey; Forward, Meredith, and Ingersoll, of Pennsylvania; Bayard, Clayton, and Rodney, of Delaware; Kennedy, Cost Johnson, and Reverdy Johnson, of Maryland; Archer, Botts, Leigh, and W. B. Preston, of Virginia; Graham, Mangum, Rayner, Clingman, and Badger, of North Carolina; Legaré, of South Carolina; Berrien, Forsyth, King, Stephens, and Toombs, of Georgia; H. W. Hilliard, of Alabama; S. S. Prentiss, of Mississippi; Bell and Jarnagin, of Tennessee; Crittenden, Morehead, Garret Davis, Wickliffe, John White, and Underwood, of Kentucky; McLean, Giddings, Vinton, Corwin, and Ewing, of Ohio; R. W. Thompson and Caleb B. Smith, of Indiana; and Woodbridge and Howard, of Michigan. Of the old nullifier element, Rives, Wise, Gilmer, and Upshur drifted off to the opposite party under Tyler's leadership.

Harrison's sudden death, and the accession of Tyler, were severe blows to the rising party, for they placed it temporarily under the feet of the remnants of its former allies, the nullifiers, just as it had begun to learn that it had a policy of its own which nullifiers could not support. But the Whigs themselves, and particularly Clay, made the blow needlessly severe. Seeing here an opportunity to secure for himself an undisputed party dictatorship in a war on Tyler, he declared war and carried it on *à l'outrance*. Its bank details are elsewhere given.<sup>1</sup>

<sup>1</sup> See Bank Controversies, IV.

In 1842, by the act of August 30th, the Whigs secured a protective tariff, closely following that of 1832, but only after sacrificing a section continuing the distribution of land to the States,<sup>1</sup> because of which Tyler had vetoed the whole bill. In the elections of 1842 for the second Congress of Tyler's term, the Democrats obtained a two-thirds majority in the House, a result usually regarded as an infallible presage of the succeeding presidential election.

And yet the Whigs do not seem to have really been weakened. Their convention met at Baltimore, May 1, 1844, the first and last really representative convention of the party. For the Presidency Clay was nominated by acclamation; and for the Vice-Presidency Theodore Frelinghuysen, then of New York City, was nominated on the third ballot.

For the first time the party produced a platform, a model in its way, as follows:

"that these [Whig] principles may be summed up as comprising a well-regulated national currency; a tariff for revenue to defray the necessary expenses of the Government, and discriminating with special reference to the protection of the domestic labor of the country; the distribution of the proceeds from the sales of the public lands; a single term for the Presidency; a reform of executive usurpations; and generally such an administration of the affairs of the country as shall impart to every branch of the public service the greatest practicable efficiency, controlled by a well-regulated and wise economy."

Even beyond the day of election the Whigs were confident of success. But their original ally, Calhoun, had been for some years at work on a project which was, directly and indirectly, to dissolve the fragile bond which as yet united the Northern and Southern Whigs, and

<sup>1</sup> See Internal Improvements.



made them a national party. It seems wrong to attribute the proposed annexation of Texas entirely to a desire for extension of the slave area: it seems to have been a subsidiary object with Southern Democratic leaders to throw into politics a question which would cost Clay either his Northern or his Southern support, and the scheme was more successful even than they had hoped.

The popular vote was nearly equal, and the electoral votes were 170 for Polk to 105 for Clay; but in the former were included the thirty-five votes of New York and the six votes of Michigan. In both these States the Polk electors were only successful because the Abolitionists<sup>1</sup> persisted in running a candidate of their own. Had their votes gone to Clay, as they would have done but for Calhoun's "Texas question" and Clay's trimming attitude upon it, Clay would have been President by 146 electoral votes to 129, and by a very slight popular majority.

What added bitterness to the disappointment was, that the Democrats had taken a leaf from the Whig book of 1840, by being protectionist in some States, and free trade in others; that Polk's majority of 699 in Louisiana was the fruit of about 1000 unblushingly fraudulent votes in Plaquemines parish; that fraudulent voting and naturalization were charged upon the New York City Democrats; and that Texas annexation had cost Clay the vote of all the Southern States except Delaware, Maryland, North Carolina, Tennessee, and Kentucky.

The consequent bitterness of feeling died away, except in one respect, the foreign vote and its almost solid opposition to the Whigs. "Ireland has conquered the country which England lost," wrote one of Clay's correspondents after the election; and the permanence of this feeling did much to turn the Whig party into the "Native American," or "Know-Nothing" party of after years.

The question of Texas annexation had not sufficed to

<sup>1</sup> See Abolition, II.

destroy the bond between Northern and Southern Whigs, for both opposed this and subsequent annexations, the former for fear of slavery extension, and the latter nominally on economic grounds, but really for fear of the introduction of the slavery question into politics. But the war with Mexico gave their opponents another opportunity, which they used.

The act recognizing the existence of war with Mexico declared the war to have arisen "by the act of the republic of Mexico." The object was to force the Whigs to vote against the war, a vote much more dangerous to a Southern than to a Northern Whig, or else array the two elements of the party against one another.

The Whigs managed to evade it, however, most of them by refusing to vote, some Senators by adding formal protests to their affirmative votes; and fourteen in the House and two in the Senate (Thomas Clayton and John Davis) found courage to vote against the bill. During the war the Whigs voted steadily for supplies to carry it on, on the principle that an American army had been thrust into danger and must be supported; so that the Democrats made very little political capital out of it. Indeed, the next Congress, which met in 1847, had a slight Whig majority in the House, a strong indication of a Whig success in the presidential election of 1848.

But the "Wilmot Proviso" (see that title) had been introduced, and it was to find at last the joint in the Whig armor. As the effort to restrict slavery from admission to the new Territories went on, it became more evident month by month that it would be supported by the mass of the Northern Whigs, and opposed by the mass of the Southern Whigs, and month by month the wedge was driven deeper. Men began to talk freely of a "reorganization of parties," but that could only affect the Whigs, for their opponents were already running the advocates of the proviso out of their organization.

As the presidential election of 1848 drew near, the nomination of Taylor, urged at first by mass meetings of men of all parties, became more essential to the Whigs. The Democrats, after banishing the proviso men, were sufficiently homogeneous to be able to defy the slavery question; no such step could be taken by the Whigs, and they needed a candidate who could conceal their want of homogeneity. In the North Taylor's antipathy to the use of the veto power was a guarantee that he would not resist the proviso, if passed by Congress; in the South he had the tact which enabled him to answer an inquiring holder of one hundred slaves thus briefly and yet suggestively: "I have the honor to inform you that I, too, have been all my life industrious and frugal, and that the fruits thereof are mainly invested in slaves, of whom I own *three* hundred. Yours truly. Z. Taylor." And his nomination was pressed harder upon the Whigs by his declared intention to remain in the field in any event, as a "people's candidate."

Nevertheless, when the Whig convention met at Philadelphia, June 7, 1848, though Taylor had 111 votes, Clay had 97, Scott 43, Webster 22, and 6 were scattering. It was not until the next day, on the fourth ballot, that Taylor was nominated by 171 votes to 107 for all others. Fillmore was nominated for the Vice-Presidency on the second ballot, by 173 to 101 for all others. Clay had thus received his discharge from party service, for he was now over seventy years of age, and evidently this was his last appearance before a Whig convention. To Webster, also, though five years younger than Clay, the blow was severe, and he publicly declared Taylor's nomination one which was eminently unfit to be made; but he and the other Northern Whigs finally supported the nomination.

Taylor carried all the Middle and Eastern States (except Maine and New Hampshire), and, in the South, Delaware, Florida, Georgia, Kentucky, Louisiana, Mary-

land, North Carolina, and Tennessee, and was elected by 163 to 127 electoral votes. In both the North and the South he had also a plurality of the popular vote, the vote for Van Buren<sup>1</sup> preventing him from having a majority. But the election of Taylor was in itself deceptive. It was the result of Democratic division in one State, New York, whose thirty-six votes would have elected Cass by an exact reversal of the electoral votes as above given. The division had really very little basis in principle, but was one of those contests between national and state party "machines" which have always been common in that State, but it sufficed to elect Taylor, and to give the Whigs almost as many representatives in Congress as their opponents.

The meeting of the new Congress in 1849 showed the first strong sign of Whig dissolution. A half-dozen Southern Whigs, headed by Toombs of Georgia, insisted on a formal condemnation of the proviso by the Whig caucus; and when that body refused to consider the resolution, the Toombs faction refused to act further with the party. The loss was not large, but it was the opening which was very soon to be fatal.

All through the session, which ended with the Compromise of 1850,<sup>2</sup> the whole body of Southern Whigs exhibited a growing disposition to act together, even in opposition to the Northern Whigs, wherever the interests of slavery were brought into question. On the final votes, in August and September, 1850, it is practically impossible to distinguish Southern Whigs from Southern Democrats. Not that the Northern Whigs generally resorted to anything stronger than passive opposition: Thaddeus Stevens's suggestion, after the passage of the Fugitive Slave Law, that the Speaker should send a page into the lobby to inform the members there that they might return with safety as the slavery question had been

<sup>1</sup> See Free-Soil Party.

<sup>2</sup> See Compromises.

disposed of, lights up the whole line of policy of the Northern Whigs during 1850. They saw only that action of any kind must offend either their Southern associates or their own constituents, and in either event ruin the party; and like the prudent man who foreseeeth the evil and hideth himself, they took temporary refuge in refusal to act.

Such a policy could not be permanent, and yet most of the Northern Whig leaders at first thought that they could at least make its advantages permanent; that they could retain their Southern associates by acquiescing, however unwillingly, in the final decision, and their Northern constituents by their unwillingness to indorse the decision itself.

Taylor's death, in 1850, and Fillmore's accession, committed the Northern Whigs to the official policy of regarding the Compromise of 1850 as a law to be obeyed until repealed, and of opposing any attempt to repeal it as a reopening of the slavery excitement. Webster's speech of March 7, 1850, which is far oftener reviled than read, was really only the first declaration of this policy and one of the least objectionable. But the popular clamor which it excited was largely an indication that Northern Whig leaders were already out of sympathy with a large fraction of their constituents.

In several Northern States schisms opened at once, the most prominent instances being those between the "conscience Whigs" and the "cotton Whigs" in Massachusetts, and the "silver gray" or administration Whigs, and the dominant Seward faction in New York. But the general spread of any such schism was not possible. No new leaders had been developed as yet to take the place of the old ones, who still held their hands on the party machinery; reflection, and the absence of further agitation, made the mass of Northern Whigs willing to retain their Southern wing, if the events of 1850 could be

tacitly treated as a past episode in the party history; and the first twenty months of Fillmore's administration went by with a great deal of murmur, but no open revolt. While there was no great disposition to excommunicate men like Seward and Giddings, who retained Whig views on every subject outside of the slavery agitation, there was at least a disposition to relegate them to the limbo of "free-soilers" and disclaim responsibility for them.

In the spring of 1852 the Southern Whigs again intervened to finally break up the party. For twenty years they had accepted a Northern alliance mainly as a point of resistance to Southern Democracy, and they had now consorted with their old opponents long enough to have lost their abhorrence of them. As the presidential election of 1852 approached, they prepared an ultimatum for the Northern Whigs which they must have known meant either the division or the defeat of the party.

At the Whig caucus, April 20, 1852, to arrange for the national convention, a Southern motion was made to recognize the Compromise of 1850 as a "finality." The motion was evaded, as not within the powers of the meeting, but its introduction was ominous. Northern Whigs were willing to yield to such a recognition, tacitly: to do so expressly would have hazarded their majority in every Northern Whig State. But when the Whig national convention met at Baltimore, June 16th, the Southern ultimatum was pressed again, and more successfully.

The platform was in eight resolutions: 1, defining the Federal Government's powers as limited to those "expressly granted by the Constitution"; 2, advocating the maintenance of both State and Federal governments; 3, expressing the party's sympathy with "struggling freedom everywhere"; 4, calling on the people to obey the Constitution and the laws "as they would retain their self-respect"; and 7, urging "respect to the authority"

of the State as well as of the Federal Government. Of the remaining three, the fifth and sixth are the last economic declaration of the party, as follows:

“5. Government should be conducted on principles of the strictest economy; and revenue sufficient for the expenses thereof ought to be derived mainly from a duty on imports, and not from direct taxes; and in laying such duties sound policy requires a just discrimination, and, when practicable, by specific duties, whereby suitable encouragement may be afforded to American industry, equally to all classes and to all portions of the country. 6. The Constitution vests in Congress the power to open and repair harbors, and remove obstructions from navigable rivers, whenever such improvements are necessary for the common defence, and for the protection and facility of commerce with foreign nations or among the states—said improvements being in every instance national and general in their character.”

The eighth and last was the Southern ultimatum, as accepted and formulated by the recognized Northern leaders, the words “in principle and substance” being interlined in the draft by Webster at the suggestion of Rufus Choate.

“8. That the series of acts of the Thirty-second Congress, the act known as the Fugitive Slave Law included, are received and acquiesced in by the Whig party of the United States as a settlement in principle and substance of the dangerous and exciting questions which they embrace; and, as far as they are concerned, we will maintain them and insist upon their strict enforcement, until time and experience shall demonstrate the necessity of further legislation to guard against the evasion of the laws on the one hand and the abuse of their powers on the other—not impairing their present efficiency; and we deprecate all further agitation of the question thus settled, as dangerous to our peace, and will discountenance all efforts to continue or renew such agitation, whenever,

wherever, or however the attempt may be made; and we will maintain this system as essential to the nationality of the Whig party and the integrity of the Union."

This was the famous resolution that gave rise to the popular verdict upon the party, "died of an attempt to swallow the Fugitive Slave Law." The other resolutions were adopted unanimously; this by a vote of 212 to 70, the latter all from Northern Whigs.

Three candidates were before the convention. On the first ballot Fillmore had 133 votes, Scott 131, and Webster 29. On the second ballot, the votes for Fillmore and Scott were reversed, and from this point there was little change until, on the fifty-third ballot, Scott was nominated by 159 votes to 112 for Fillmore and 21 for Webster. Graham was then nominated on the second ballot for the Vice-Presidency.

Scott's availability was much like that of Taylor, less the latter's popularity; his military services were great, and very little was known of his political opinions. But the Whigs were beaten long before election day. In the North the eighth resolution cut deep into the Whig vote, and it gained no votes in the South. For some unintelligible reason Scott had been the candidate of the anti-slavery vote in the convention, and he was believed to be much under the influence of Seward: the consequent refusals of Southern Whigs to vote made the popular vote in Southern States noticeably smaller than in 1848.

As a result of both influences the Whigs carried but four States, Massachusetts and Vermont in the North, and Kentucky and Tennessee in the South, and even these by very narrow majorities. Scott and Graham were defeated; but 71 Whigs were chosen out of 234 Representatives in the next Congress; 22 of these were Southern Whigs, most of whom, like A. H. Stephens, had publicly refused to support Scott in 1852, and were



soon to be openly Democrats; and the great Whig party was a wreck. The country had no use for it: its economic doctrines were not a subject of present interest, and on the overmastering question of the extension of slavery it could neither speak nor keep silence without sealing its own fate.

For the first few months of Pierce's term there was an unwonted quiet in politics. New men sought to build up a new party on the ruins of the Whig organization by utilizing the old Whig feeling against the foreign vote<sup>1</sup>; and, as this promised a possible escape from the slavery question, the remnants of the Whig party in 1856 indorsed the "American" nomination of Fillmore and Donelson, "without adopting or referring to the peculiar doctrines" of the party which had at first nominated them. But, by this time, most of the former Northern Whig vote had gone into the new Republican party (see its name) under new leaders, while a large part of the former Whig leaders had gone into the Democratic party. Thus the former element gave the Republican party its economic doctrines, while the latter lost all distinction as it changed its habitat.

Still, the Whig remnants lived on in a few Northern States until 1857-8, when they were finally absorbed into the Republican party. In 1860 the old Whig element in the border States nominated Bell and Everett,<sup>2</sup> and was still strong enough to dispute the Southern States with the ultra Democracy; but the outbreak of the Rebellion dissipated this last trace of the once-powerful Whig party.

The history of the party nominally covers a quarter of a century, 1828-52, but it must be confessed that its real and distinct existence covers only about four years, 1842-6, and that its only real party action was its nomination of Clay in 1844, with the possible exception of Clay's nomination in 1831. During all the rest of its

<sup>1</sup> See American Party.

<sup>2</sup> See Constitutional Union Party.

history the party was trading on borrowed capital, and its creditors held mortgages on all its conventions, which they were always prompt to foreclose. And yet it had its own office to perform, for in its members, rather than in its leaders, was preserved most of the nationalizing spirit of the United States. In this sense, if we may not altogether accept the epitaph suggested by one of its leaders, that "the world was not worthy of it," we may at least believe that the nation was not ready for it.

THE LOCO-FOCOS were the radical faction, 1835-7, of the Democratic party, properly of New York, though the name was afterward made national.

The early system of bank charters in New York, without any general law, but by special legislation for each case, gave wide room for favoritism, partisanship, and open fraud. In 1798-1800 there were but three banks in the State, at Albany, Hudson, and New York City; and the latter was entirely controlled by the Federalists, who, it was alleged, refused to accommodate their political opponents.

Burr contrived to secure from the Legislature in 1799 an act "for supplying the city of New York with pure and wholesome water," one clause of which authorized the company to employ its surplus capital "in any way not inconsistent with the laws and Constitution of the United States, or of the State of New York." Under this innocent provision a Democratic bank was afterward established.

As soon as the Democrats gained control of the State, in 1800-1, they, in their turn, chartered party banks; and open corruption in the grant of charters went so far that in 1812 the Governor prorogued the Legislature from March 27th until May 21st, in order to prevent the open purchase of the charter of the Bank of America from the Legislature. In 1821 the new constitution of the State

required a two-thirds vote of both Houses to charter a moneyed institution; but this, by increasing the amount of purchase necessary, made the grant of new charters in 1825 still more scandalous. All the difficulty was due to the vicious principle of incorporating companies by special legislation.

In 1834-5, when it had become apparent that the Bank of the United States would not be re-chartered,<sup>1</sup> a mania for new banks in New York revived the former scandals; and the opposition which should have been confined to the *system* of incorporation was at first extended to the corporations themselves. Through the summer of 1835 an organization was effected of Democrats in New York City opposed to the banks; their original demand was that no special privileges should be given by charter to any corporation, and they assumed the name of the "equal-rights party."

October 29, 1835, at a meeting called at Tammany Hall to act on the report of their nominating committee, the regular or Tammany Democrats attempted to seize control of it, entering by the back stairs as the equal-rights men came up the front. Both parties tumultuously elected chairmen; but the Tammany men, finding their opponents too strong for them, turned out the gas and retired. The equal-rights men instantly produced candles and "loco-foco" matches, relighted the hall temporarily, and concluded their work. From this circumstance the Whig and the regular Democratic newspapers invented the nickname of the Loco-Foco party, which clung to the new faction, and afterward to the whole Democratic party, for some ten years.

In January, 1836, the Loco-Foco county convention adopted a platform, or "declaration of rights"; it declared that the rightful scope of legislation was only to declare and enforce the natural rights of individuals; that

<sup>1</sup> See Bank Controversies, III.

no legislature had the right to exempt corporations, by charter, from trial by jury or from the operation of any law, or to grant them special privileges; that charters were subject to repeal; and that paper money in any form was a vicious circulating medium.

The party was steadily beaten in city elections, but its vote increased so far that in September, 1836, it held a State convention at Utica, and nominated candidates for governor and lieutenant-governor. These were also defeated, but the party's vote showed no signs of a falling off, and in September, 1837, another convention was held at Utica. This body framed and proposed for general discussion a new constitution for the State, one of whose features was an elective judiciary.

President Van Buren's message, September 4, 1837, at the opening of the "panic session," brought the Loco-Foco element back to its original party, for, as Hammond exactly states the case, "if it did not place the President in an attitude of war against the banks, it placed the banks in a belligerent attitude against him." The message, in its condemnation of the employment of corporations for purposes which might be obtained by private association, in its opinion in favor of gold and silver as the only government money, and in its declaration that the government revenues ought not to be deposited in State banks, enabled the Loco-Focos to regard Van Buren as their own leader. They were already prepared to do so by the course of some of the Whigs in accepting Loco-Foco nominations, but acting with the Whigs when elected.

From this time they were a part of the Democratic party, but their continuing influence was apparent, 1, in the passage of the safety-fund banking law of April 13, 1838, and, 2, in the State constitution of 1846, with its elective judiciary, and its prohibition of bank charters, except by general laws. But from 1837 until the slavery

question began to take shape, in 1846-7, the Whig speakers and journals were careful to give the name Loco-Foco to the national party of their opponents, as if to imply their general opposition to the moneyed interests of the country, and to transfer to them the general charges of agrarianism, "Fanny-Wright-ism," and revolutionary designs which had at first been levelled at the Loco-Focos by both the regular Democrats and the Whigs.<sup>1</sup>

**THE AMERICAN PARTY.**—Opposition to aliens has at intervals been a feature in American politics from the foundation of the government. During the period 1790-1812 the question whether war should be declared against Great Britain or against France was almost always a critical one, the Democrats<sup>2</sup> preferring, of the two, war against Great Britain, and the Federalists<sup>3</sup> war against France, though both were professedly anxious for neutrality.

During this period most of the immigrants were really banished men, driven from England, Scotland, or Ireland for too free use of the printing-press, for hostility to the British Government, or for affection to that of France. Naturally these immigrants took the Democratic view of the great debatable question, in all its ramifications; as naturally the Federalists became an anti-alien party; and as naturally the aliens sought refuge in a permanent alliance with the Democrats which has been kept up by their successors.

The first naturalization act (March 26, 1790,) made two years' residence necessary, and this was prolonged by act of January 29, 1795, to five years, as at present; but the Federalists, in 1798, having taken advantage of the war

<sup>1</sup> See Bank Controversies; Independent Treasury; Democratic Party, IV.

<sup>2</sup> See Democratic-Republican Party.

<sup>3</sup> See Federal Party.

fever against France and their own almost absolute power, raised the period to fourteen years.<sup>1</sup> Jefferson's election and the Democratic triumph in 1800 brought the period back to five years in 1802, and insured fresh reinforcements of aliens to the dominant party. The British Minister, Foster, soon after his return, in 1812, from America, where he had honestly and vainly striven to avert war, stated in the House of Commons that among those who voted in Congress for the declaration of war were at least six late members of the Society of United Irishmen.

The increasing feeling of the Federalists produced an anti-alien clause in the amendments proposed by the Hartford Convention,<sup>2</sup> but with returning peace the nativist feeling died away. When the congressional caucus, in 1824, nominated Crawford and Albert Gallatin (a Swiss by birth), the latter withdrew because of the strong objection made to his nomination, which, indeed, was improper.

The first revival of nativism was naturally in New York City, where a foreign population early began to form. In 1835-7 an attempt at a native organization was made, but it had ended in failure before the election for mayor in April, 1837. The close vote of the Whigs and Democrats, and their alternate successes, had given bitterness to their contests in the city, and when the Democrats at the election for mayor in April, 1843, carried the city (Morris, Democrat, 25,398; Smith, Whig, 19,517), they proceeded to parcel out the local offices, giving the lion's share to foreign-born citizens. The result was seen at the election for State Senator in November, 1843: Jones, Democrat, 14,325; Franklin, Whig, 14,291; Quackenboss, American Republican, 8549; the latter's vote being evidently mainly Democratic. In April, 1844, the

<sup>1</sup> See Alien and Sedition Laws.

<sup>2</sup> See Convention, Hartford.

vote stood: Harper, native American, 24,510; Coddington, Democrat, 20,538; Franklin, Whig, 5297; and the city passed under native control.

By this time the native movement had spread to New Jersey and Philadelphia, and in the latter place several lives were lost and much property (including two Catholic churches) destroyed in riots between natives and Irish citizens. The Whigs had generally voted with the Democratic natives in order to secure their vote for Henry Clay, but when, in November, 1844, New York City and Philadelphia gave native majorities, and at the same time majorities for the Democratic presidential electors, the Whigs drew off. In April, 1845, the vote in New York City stood: Havemeyer, Democrat, 24,307; Harper, native American, 17,485; Selden, Whig, 7032; and in 1847 the new party had disappeared in New York City.

As a result of the election of 1844, the Twenty-ninth Congress, in December, 1845, had six native Representatives, four from New York (2d, 3d, 5th, and 6th districts), and two from Pennsylvania (1st and 3d districts). In the Thirtieth Congress there was but one (Pennsylvania, 1st district). Thereafter for some years, with the exception of very small votes occasionally cast in New York, New Jersey, and Pennsylvania, nativism disappeared.

About 1852, when the rapidly growing sectional contest as to the extension of slavery to the Territories had begun to sap the old allegiance of members of both parties, and when the Whigs might almost be described as maddened by the steady stream of reinforcement which their Democratic opponents were receiving from immigration, nativism again appeared in the form, new to American politics, of a secret, oath-bound fraternity, whose name is said to have been *The Sons of '76*, or *The Order of the Star-Spangled Banner*. Its real name and objects were not revealed even to its members until they had reached

the higher degrees, and their constant answer when questioned on these subjects—"I don't know"—became almost a shibboleth of the order and gave it the popular name by which it is still known—"Know-Nothings."

Its ostensible moving causes were the increasing power and designs of the Roman Catholic Church in America, the sudden influx of immigrants after the failure of the European revolutionary movements in 1848-50, and the greed and incapacity of naturalized citizens for public office; its cardinal principle was that "Americans must rule America"; and its favorite countersign was a mythical order of Washington on a critical occasion, "Put none but Americans on guard to-night." Its nominations were made by secret conventions of delegates from the various lodges, and were voted for by all members under penalty of expulsion. At first these nominations were merely selections of the best men from the rival Whig and Democratic tickets. No public notice of such indorsement was ever given, but its effects were visible in the counting of the votes and threw political calculations into chaos. So long as this plan was followed, though the order's name did not appear in politics, it was really the arbiter of elections.

In 1854 the Kansas-Nebraska Bill was passed, and resulted in the permanent division of the Northern Whigs. Those who were not sufficiently opposed to slavery to enter the new Republican party, and who despaired of further national success under their old party name, saw no refuge from the Democratic party and its reinforcements from increasing immigration except in the Know-Nothing order, which now, tacitly accepting the name of the American party, struck out a separate existence in politics.

The race between the Republican and American parties was at first fairly even. In the State elections of 1854 the latter party carried Massachusetts and Delaware, and



in New York polled the respectable vote of 122,282. But it was still a Middle State party and had no opening in the West, where the Republican party was steadily conquering a place as the only opponent of the Democratic party. In the State elections of 1855 the American party, though it gained little in the West, made a great stride in advance southward, spreading its organization among the former Whigs in that section. So late as 1881 the proportion of foreign-born population in the South, except in Florida, Louisiana, and Texas, was under two per cent., or practically nothing. In 1855 this absence of foreign-born population was universal in the South, and the nativist feeling among the Whigs of that section made it easy to transfer them to the American party, which thus secured in both sections the governors and legislatures of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, California, and Kentucky, the controller and legislature of Maryland, and the land commissioner of Texas, and in Virginia, Georgia, Alabama, Mississippi, Louisiana, and Texas was beaten only by majorities ranging from two thousand to eleven thousand.

It seemed for the moment that three parties would exist in future, a Republican party in the West, and an American party in the Southern and Middle States, struggling for supremacy in the Northeast, while the Democratic organization remained intact in all the sections. Even in the hour of the American party's first successes, however, Greeley, of New York, shrewdly observed that it seemed to have "about as many of the elements of persistence as an anti-cholera or anti-potato-rot party would have."

Encouraged by its brilliant initiation into State politics, the order began preparations for a campaign as a national party in 1856, hoping for support from all who were tired of agitation either for or against slavery. In-

stead of this it aimed to introduce opposition to aliens and Catholicism as a national question. Leading Catholics were brought to bay in public controversies, the persecutions in all countries by the Catholic Church were recounted, special denunciations were levelled at Bedini, the "pope's nuncio," and Americans were warned that the inquisition would "kindle the fires of the holy *auto da fé* on the high places of our republic, and deluge our blooming plains with American blood." The hollowness of this effort to escape the inevitable conflict, ostrich-fashion, became evident in the party's first and only national convention, into which the dreaded slavery question at once forced its entrance.

February 19, 1856, a secret grand council of delegates met at Philadelphia and after a stormy session of three days adopted, February 21st, a platform in sixteen propositions, the principal being as follows:

"(3) Americans must rule America; and to this end native-born citizens should be selected for all State, Federal, and municipal offices. (9) A change in the laws of naturalization, making a continued residence of twenty-one years necessary for future citizenship. (12) The enforcement of 'all laws' until repealed or decided unconstitutional. (13) Opposition to Pierce's Administration for its expulsion of 'Americans' from office, and its reopening sectional strife by repealing the Missouri Compromise. (15) That State councils should abolish their degrees, and substitute a pledge of honor to applicants for admission."

The party, thus dropping a part of its secret machinery, hoped to gain votes in the North by denouncing the Administration and the Kansas-Nebraska Bill, in the South by upholding the Fugitive Slave Law, and in both sections by substituting nativism for slavery agitation.

The open nominating convention met the following day, February 22d, with 227 delegates, Maine, Vermont,

Georgia, and South Carolina being unrepresented. About fifty delegates were "north" Americans, of Republican, or anti-Nebraska, sympathies, and these offered a resolution denying the power of the secret grand council to bind the convention by a platform. This was negatived, 141 to 59, and by 151 to 51 a ballot for candidates was ordered. Many of the "north" Americans then withdrew. After one informal ballot, Millard Fillmore was nominated, on the first formal ballot, as follows: M. Fillmore, 179; George Law, 24; Kenneth Rayner, 14; John McLean, 13; Garret Davis, 10; Sam. Houston, 3. Necessary to a choice, 122.

By a vote of 181 to 24 for all others, Andrew Jackson Donelson, of Tennessee, was nominated for Vice-President, and the convention adjourned. Its nominations were adopted, "without adopting or referring to the peculiar doctrines of" the American party, by a Whig national convention at Baltimore, September 17th.

The preliminary State elections of 1856 were by no means discouraging for the American party. In New Hampshire and Rhode Island its governors were renominated and elected in the spring, so that eight of the thirty-two States now had American governors. The presidential election in November, however, showed that in national matters the party had indeed none of the "elements of persistence." In New Hampshire, in March, 1856, the vote had been 32,119 American, 32,031 Democratic, 2360 Whig; in November of the same year it was 38,345 Republican, 32,789 Democratic, 422 American. The first wave of the Republican tide from the West had washed nativism almost out of New England. The American (popular) vote was 874,534 in a total of 4,053,967; and its total electoral vote was 8 out of 296, the vote of Maryland.

In the State elections of 1857 the American party carried Rhode Island and Maryland, and in the Thirty-fifth

Congress, which met in December, 1857, it had from fifteen to twenty Representatives and five Senators. When the Thirty-sixth Congress met in 1859 it had become almost entirely a border State or "south" American party, having two Senators, one each from Kentucky and Maryland, and twenty-three Representatives, as follows: Kentucky 5, Tennessee 7, Maryland 3, Virginia 1, North Carolina 4, Georgia 2, and Louisiana 1. In 1860<sup>1</sup> it made another desperate effort to save the country by ignoring slavery agitation, and, having failed to carry the South, disappeared finally from politics.

The existence of a secret and oath-bound party was always an anachronism in an age and country where free political discussion is allowed. But the short-lived organization introduced many young men to politics, who would have found no opportunity in the other parties, and served to delay in some degree the inevitable conflict until the adverse elements had fully come to a head.<sup>2</sup>

THE HUNKERS were originally the conservative Democrats in New York State, but the name was used occasionally also in other States. Although the name was not used until about 1844, the faction to which it was applied may be traced through New York history from 1835 until 1860, in opposition successively to the "Loco-Foco" faction, the Radicals, and the Barnburners; and finally divided into the "Hards" and the "Softs." In all these divisions the Hunkers represented merely the inertia of the State Democratic party, and its dislike to the introduction of new questions. From 1835 until 1840 the Hunkers, though not yet named, were opposed to the Loco-Foco war on bank charters,<sup>3</sup> but yielded so far as to pass a satisfactory State banking law in 1838. From 1840 until 1846 they opposed, with the same final want of success,

<sup>1</sup> See Constitutional Union Party.

<sup>2</sup> See Whig Party; Anti-Masonic Party, II.

<sup>3</sup> See Loco-Foco.

the demand of the Radicals for a revision of the State constitution, an elective judiciary, and a cessation of unprofitable canal enterprises. From 1846 until 1852 they were finally successful, though at first defeated, in opposing the maintenance of the State branch of the Democratic party in antagonism to the national party.<sup>1</sup>

After 1852 the Marcy portion of the Hunkers, commonly called "Softs," supported the Pierce Administration, while the Dickinson wing, the "Hards," opposed it. During the Civil War the latter were generally "war Democrats." During the last eight years of the period 1835-60, the division line was fainter, but in general the Hunker leaders were Daniel S. Dickinson, Edwin Crosswell, Wm. C. Bouck, Wm. L. Marcy, Horatio Seymour, and Samuel Beardsley; and their leading opponents were Martin Van Buren, Silas Wright, A. C. Flagg, John A. Dix, Reuben E. Fenton, Samuel Young, and Michael Hoffman.

**THE FREE-SOIL PARTY.**—The history of this party, the first one which aimed specially at the restriction of slavery to its State limits, covers a period of but about five years, 1848-52, and may best be understood by first considering the two elements which composed it, the political Free-Soilers and the conscientious Free-Soilers.

1. The political Free-Soilers were confined to the State of New York, and were mainly the voters of that State political organization, or "machine," of which ex-President Van Buren had long been the recognized head. Van Buren's defeat in the Democratic convention of 1844, and the political revolution in the party which was a consequence of it, were results of Southern votes and of a distinct Southern question; and the first effort of the Polk Administration, like every other administration of any party in a similar situation, was to encourage the

<sup>1</sup> See Barnburners, Free-Soil Party.

building up of a new organization of its own, for the purpose of ousting the old organization from the control of the great State of New York.<sup>1</sup> The old organization, however, in the present case, was too strongly entrenched to surrender power easily, and the four years of Polk's Administration were marked by a progressive split in the Democratic party of New York, resulting, toward 1847, in the formation of two distinct factions, the Barnburners and the Hunkers.<sup>2</sup> The former was the Van Buren organization, and its opposition to the Administration which had supplanted it naturally took the form of opposition to the extension of slavery to the Territories. It therefore fell naturally into the Free-Soil party on its organization. The division in the New York Democratic party, though apparently healed in 1852, lasted in reality for many years further, the former Barnburners and Hunkers taking the names of "Softs" and "Hards," respectively.

2. The conscientious Free-Soilers were not confined to New York, but were found in every Northern State, and in Maryland, Delaware, Virginia, and Kentucky, in the South. They were mainly the members of the Liberty party,<sup>3</sup> re-enforced, after 1844, by a part of the anti-slavery element which had been common, up to that year, throughout the agricultural membership of the Northern Democratic party. In the fall of 1847 they held a national convention at Buffalo, still under the name of the Liberty party, and nominated John P. Hale, of New Hampshire, and Leicester King, of Ohio, as

<sup>1</sup> See Democratic-Republican Party.

<sup>2</sup> The Barnburners were the Free-Soil Democrats (especially applied to those of New York) who were bent upon freeing their party from complicity with slavery extension. They were ready to leave their party rather than be made responsible for such a policy. Their Hunker opponents compared them to the stupid farmer who proposed to burn his barn in order to get rid of the rats; hence the name.

<sup>3</sup> See Abolition, II.

presidential candidates; but toward the spring of 1848 the evident division in the New York Democratic party, which it was hoped would extend to other States, encouraged them to drop their nominations and take part in the formation of the Free-Soil party.

The Democratic convention at Baltimore in 1848 was attended by delegations from both the Barnburner and Hunker factions from New York, each claiming to represent the State. May 25th, by a vote of 133 to 118, the convention admitted both delegations, giving half the State vote to each. Both delegations rejected the decision, and withdrew from the convention.

The Hunkers, satisfied with having kept their opponents out, and secure of the support of the Administration, did nothing further. The Barnburners met in State convention at Utica, June 22d, and nominated Martin Van Buren and Henry Dodge, of Wisconsin, as presidential candidates, apparently for the purpose of maintaining their State organization, of showing their ability to control the State electoral vote, and thus of forcing some compromise which would secure for them recognition as an essential part of the New York Democracy. General Dodge refused to accept the nomination.

In the meantime a call had been issued for a general Free-Soil convention at Buffalo, August 9th. It was attended by 465 delegates from nearly all the free States, and from Delaware, Maryland, and Virginia, eighteen States in all. For President, Martin Van Buren received 244 votes to 181 for John P. Hale, and was nominated; Charles Francis Adams was nominated for Vice-President. The platform was very long, in three preambles and sixteen resolutions.

The preambles declared the delegates' independence of the slave power; their secession from the Democracy; their inability to join the Whigs, who, in nominating Taylor, had "abandoned their distinctive principles for

mere availability''; and their determination to secure ''free soil to a free people.''

The resolutions declared in general that slavery in the States was valid by State laws, for which the Federal Government was not responsible; but that Congress had ''no more power to make a slave than to make a king,'' and hence was bound to restrict slavery to the slave States, and to refuse it admission to the Territories.

In the election of 1848 for President the new party cast 291,263 votes, a great but deceptive advance on the Liberty party's vote in 1844. It was entirely a free-State vote, except 9 in Virginia, 80 in Delaware, and 125 in Maryland. Outside of New York the Free-Soilers outnumbered the Democrats in Massachusetts and Vermont, and gave the votes of Illinois, Indiana, Iowa, Maine, Michigan, Ohio, and Wisconsin to the Democratic candidates by small pluralities; in New York they polled 120,510 votes to 114,318 votes for Cass and Butler, and gave the electoral votes of the State to the Whig candidates.

Both elements of the Free-Soil party were thus satisfied; the conscientious Free-Soilers, frequently called ''Abolitionists,'' had punished and demoralized the Whig party, and the political Free-Soilers, commonly called ''night soilers'' or ''free-spoilers,'' by their Hunker opponents, had punished and demoralized the Democratic party.

The principal result of the congressional elections of the same year was that the New York delegation was changed from ten Democrats and twenty-four Whigs (in 1847-9) to one Democrat, one Free-Soiler, and thirty-two Whigs (in 1849-51).

In Congress the Free-Soil Representatives at once took separate ground, apart from both Whigs and Democrats. In the Thirty-first Congress they numbered two in the Senate, Hale and S. P. Chase), and in the lower House



fourteen, including Preston King, of New York, J. R. Giddings, Lewis D. Campbell, and Joseph M. Root, of Ohio, Geo. W. Julian, of Indiana, David Wilmot, of Pennsylvania<sup>1</sup> and Horace Mann, of Massachusetts. In the Thirty-second Congress (1851-3) they had three in the Senate, Charles Sumner having taken his seat there, and seventeen in the House. In the Thirty-third Congress (1853-5) the Free-Soilers in the Senate numbered from three to five; in the House they had about the same number. After that time they were swallowed up in the sudden rise of the anti-Nebraska tide.<sup>2</sup>

Negotiations between the political Free-Soilers and the other Democratic faction in New York began again (if they had ever really ceased) in 1849. Both factions attended the State convention of that year, and united in the nomination of State candidates and in the adoption of a vague and indefinite resolution on the slavery question. In 1850 the State convention went further, and passed a resolution that it was "proud to avow its fraternity with and devotion to" the principles of the Democratic national convention of 1848. Against this resolution the political Free-Soilers, headed by John Van Buren, could now muster but twenty votes. The result was the absorption of the Van Buren faction into the State Democratic party, and the reduction of the Free-Soil vote of New York in 1852 to its real limits. The breach in the State Democracy was thus closed, but never really healed.

In 1852 the national convention of both the Whig and the Democratic parties accepted the compromise of 1850<sup>3</sup> in all its parts. The Free-Soilers therefore held a convention at Pittsburg, August 11, 1852, with delegates from all the free States, and from Delaware, Maryland, Virginia, and Kentucky. Their recent New York allies

<sup>1</sup> See Wilmot Proviso.

<sup>2</sup> See Republican Party.

<sup>3</sup> See Compromises, V.

were not represented. Henry Wilson, of Massachusetts, presided; the platform of 1848 was enlarged to twenty-two resolutions; and John P. Hale, of New Hampshire, and George W. Julian, of Indiana, were nominated as presidential candidates. The platform of the "Free Democratic party" denounced slavery as "a sin against God and a crime against man"; it denounced "both the Whig and the Democratic wings of the great slave compromise party of the nation"; and it repudiated the Compromise of 1850, and demanded the repeal of the Fugitive Slave Law.

In the presidential election of 1852 the Free-Soilers cast but 156,149 votes, all in Northern States excepting 62 in Delaware, 54 in Maryland, 265 in Kentucky, and 59 in North Carolina. In all the Northern States except Iowa, the Free-Soil vote was slightly decreased, owing mainly to the party's rejection of the compromise of 1850; in New York it had fallen to 25,329, the real Free-Soil vote, apart from its political allies in that State.

After the election of 1852 the Free-Soilers shared in the general suspension of political animation which followed. In 1854 they opposed the Kansas-Nebraska Bill, and in 1855-6 were absorbed by the newly formed Republican party. The Thirty-fourth Congress, when it met in December, 1855, contained Democrats, Whigs, anti-Nebraska men, Free-Soilers, and Americans or Know-Nothings; before February, 1856, there were only Republicans, Democrats, and Americans, and the Whig and Free-Soil parties had disappeared from Congress.

The principles of the Free-Soil party as to slavery restriction were identical with those of the great and successful Republican party which followed it, and yet the former, from 1846 until 1854, probably never really gained ten thousand votes in the entire country. Its

lack of success was due in part to its insistence upon strict construction in other matters than slavery, while the Republican party was generally broad construction; but the principal reason was, that the country was not yet ready for it. Some such measure as the Kansas-Nebraska Bill was an essential prerequisite to the formation of a successful anti-slavery party; and opposition to that particular measure required broad-construction views of the powers of Congress.<sup>1</sup>

THE CONSTITUTIONAL UNION PARTY, was the name adopted in 1860 by the Southern remnant of the defunct Whig party. The election of 1852 closed the national career of the Whigs. In 1856 they endeavored to evade the slavery question by joining with the Know-Nothings,<sup>2</sup> but the result showed that this alliance had no hope of success. May 9, 1860, a convention was held at Baltimore of Whigs who had not yet drifted off, in the South, to the Democratic, or, in the North, to the Republican, party. Delegates were present from twenty States, and but two ballots were needed for the choice of the leading candidate. On the first, Bell had 68½ votes, Houston 57, Crittenden 28, Everett 25, W. A. Graham, 22, McLean 21, and 32½ scattering; on the second, Bell had 138, Houston 69, Graham 18, and 27 scattering. Bell was thus nominated for the Presidency; and Everett was then unanimously nominated for the Vice-Presidency.

The platform adopted consisted of a preamble denouncing platforms in general as tending to form "geographical and sectional parties," and a resolution, in part as follows: "That it is both the part of patriotism and of duty to recognize no political principle other than *the constitution of the country, the union of the States, and the enforcement of the laws.*" The rest of the resolution

<sup>1</sup> See Nation; Democratic Party, IV.; Republican Party, I.; Wilmot Proviso; Abolition, II.; Slavery.

<sup>2</sup> See American Party, I.

merely pledged the convention to support the principles assigned. It seems to have unfortunately escaped the attention of the convention that the true interpretation of the three principles, which it announced as fixed and settled, was the question then in dispute and unsettled. The object of the resolution, however, though clumsily expressed, is sufficiently plain: it was an invitation to all patriotic voters to abandon the Republican party, which attacked, and the Democratic party, which defended slavery, and recur to the old Whig programme of entirely ignoring slavery as a political question. Its avoidance of the word Whig, and its acceptance of a new name, should have been a plain warning that its programme was also obsolete.

In the South the Bell-Everett platform was the only medium of expression for the Union men of the section, who could not be Republicans and would not be Breckinridge Democrats. It carried Kentucky, Tennessee, and Virginia by pluralities over Breckinridge, and came within 722 votes of carrying Maryland. It was defeated by less than four thousand votes in each of the States of Arkansas, Delaware, North Carolina, Florida, and Louisiana, and in only two Southern States, Mississippi and Texas, was defeated by more than ten thousand votes. In the North it was almost a nonentity, its votes ranging from 161 out of 152,180 in Wisconsin, to 6817 out of 118,840 in California. Its total popular vote was 589,581, and its electoral vote 39.

The Bell leaders in the South seem to have been stung by the Northern indifference to their claims, and offered little effective resistance to the secession movement which followed the election. The first wave of civil war blotted out forever the last trace of the Whig party, and its few surviving members, when they reappeared in politics, during and after reconstruction, did so as Democrats.<sup>1</sup>

<sup>1</sup> See Democratic Party, VI.

See references on Parties 1789-1824 in Vol. I. In addition to those references, see also, on the period 1824-1860.

(A) *In General*: See Capen's *History of Democracy*; Gillet's *Democracy in the United States*; Van Buren's *Origin of Political Parties in the United States*; Cutts's *Treatise on Party Questions*; Harris's *Political Conflict in America*; G. Lunt's *Origin of the Late War*; Tucker's *United States* (to 1840); Wise's *Seven Decades*; Cluskey's *Political Text Book of 1860*; *Tribune Almanac* (1838-81); *North American Review* (January, 1876), Art. "Politics in America"; Draper's *Civil War*; Greeley's *American Conflict*; 1-3 Von Holst's *United States*; Young's *American Statesman*; Johnston's *History of American Politics*; *Statesman's Manual*; Benton's *Debates of Congress* (1789-1850); *Congressional Globe* (1850-61); Appleton's *Annual Cyclopædia* (1861-80). (B) *In Particular Periods*: (I., II.: 1789-1801) see 1 Schouler's *United States*; 2 Pitkin's *United States*; 2 Holmes's *United States*; 4, 5 Hildreth's *United States*; 1 Draper's *Civil War* (introd. chap.); 3, 4 Jefferson's *Works* (ed. 1829); 1, 2 Rives's *Life of Madison*; 2 Randall's *Life of Jefferson*; 1 Tucker's *Life of Jefferson*; Austin's *Life of Gerry*; Parton's *Life of Burr*; 1 Parton's *Life of Jackson*; Adams's *Life of Gallatin*; Hunt's *Life of Livingston*, 46-105; and authorities under Anti-Federal Party; Federal Party, I.; Bank Controversies, II.; Whiskey Insurrection; Jay's Treaty; X. Y. Z. Mission; Alien and Sedition Laws; Disputed Elections, I. (III.: 1801-25) see 5, 6 Hildreth's *United States*; Bradford's *Federal Government*; 1 Hammond's *Political History of New York*; 3 Randall's *Life of Jefferson*; 2 Tucker's *Life of Jefferson*; 4 Jefferson's *Works* (ed. 1829); T. Cooper's *Consolidation*; Parton's *Life of Burr*; 2 Davis's *Life of Burr*; Garland's *Life of Randolph*; Pinkney's *Life of Pinkney*; Adams's *Life of Gallatin*; Carey's *Olive Branch* and *New*

*Olive Branch*; Jenkins's *Life of Calhoun*; Dallas's *Writings of Dallas*; Ingersoll's *Second War with Great Britain*; 4-6 Adams's *Memoir of John Quincy Adams* (Diary); and authorities under Annexations, I., II.; Burr, Aaron; Embargo; Gunboat System; Federal Party, II.; Clinton, De Witt; Bank Controversies, II., III.; Convention, Hartford; Whig Party, I.; Congressional Caucus; Compromises, IV.

On the Democratic Party (1824-60) see Benton's *Thirty Years' View*; 2 Hammond's *Political History of New York*; 1 Draper's *Civil War*; 2, 3 Von Holst's *United States*; *The Democratic Review* (1838-50); Bradford's *Federal Government* (to 1839); Amos Kendall's *Autobiography*; Sumner's *History of American Currency*; 3 Parton's *Life of Jackson*; Hunt's *Life of Livingston*; Hammond's *Life of Silas Wright*; Holland's *Life of Van Buren*; Scott's *Life of H. L. White*; Mackenzie's *Life and Times of Van Buren*, and *Lives of Butler and Hoyt* (both useless except for the letters contained in them); Jenkins's *Life of Calhoun*; Parton's *Famous Americans*; Appleton's *American Cyclopædia*, Art. "Calhoun"; Chase's *Administration of Polk*; Hamilton's *Memoir of Rantoul*; and authorities under Whig Party, I., II.; Albany Regency; Anti-Masonry; Nominating Conventions; Cherokee Case; Internal Improvements; Foot's Resolution; Nullification; Bank Controversies, III., IV.; Deposits, Removal of; Veto; Censures; Loco-Foco; Conservative; Slavery; Abolition, II.; Petition; Annexations, III., IV.; Oregon; Wilmot Proviso; Barnburners; Free-Soil Party; Compromises, V.; Popular Sovereignty. 3 Spencer's *United States*; *Democratic Review* (cont. as *United States Magazine*, to 1859); 3-6 Stryker's *American Register*; 1 A. H. Stephens's *War Between the States*; Schuckers's *Life of S. P. Chase*, 128-195; Dickinson's *Life of D. S. Dickinson*; Botts's *Great Rebellion*; Pollard's *Lost Cause* (cap. 1);

Buchanan's *Buchanan's Administration*; *Atlantic Monthly*, 1861, and *North American Review*, 1866 (articles on Douglas); Chittenden's *Peace Convention*; and authorities under Popular Sovereignty; Fugitive Slave Law; Kansas-Nebraska Bill; Slavery; American Party, I.; Whig Party, II., III.; Republican Party; Dred Scott Case; Territories; Kansas; Brown, John; Secession; Compromises, VI.

On the Republican Party authorities will generally be found under the articles referred to. See also, 2 Wilson's *Rise and Fall of the Slave Power*, 406; 1 Greeley's *American Conflict*, 246; McClellan's *Republicanism in America* (to 1869); Giddings's *History of the Rebellion*, 382; Smalley's *History of the Republican Party* (to 1882); Curtis's *History of the Republican Party* (to 1904); Johnston's *History of American Politics*, 162; *Tribune Almanac*, 1855-83; Greeley's *Political Text Book of 1860*; McPherson's *Political History of the Rebellion*, and *Political Manuals*; Moore's *Rebellion Record*; Schuckers's *Life of Chase*; Raymond's *Life of Lincoln*, and other authorities under names referred to; Spofford's *American Almanac*, 1868-83; Appleton's *Annual Cyclopædia*, 1861-83; *The Nation*, 1865-83; and current newspapers; Woodburn's *Political Parties*; Rhodes's *History of the United States*; Stanwood's *History of the Presidency*, *Official Reports of the National Conventions*.

On Anti-Masonry see (1.) Creigh's *Masonry and Anti-Masonry*; 2 Hammond's *Political History of New York*, 369, 403; H. Brown's *Anti-Masonic Excitement*, in 1826-9; Ward's *Anti-Masonic Review* (1828-30); 1 Seward's *Writings*; *Proceedings of the U. S. Anti-Masonic Convention*, in Philadelphia, Sept. 11, 1830; Stone's *Letters on Anti-Masonry*; and earlier authorities under Whig Party; (2.) *Christian Cynosure*, 1880; Greene's *Broken Seal*; Gasset's *Catalogue of Anti-Masonic Books in Public Libraries*. The latest and most complete treatment

of this subject is Mr. Charles McCarthy's "The Anti-Masonic Party," in *Report of the American Historical Association for 1902*.

There is no good history of the Whig Party. Ormsby's *History of the Whig Party* gives so much space to events before 1824 that only the last two hundred pages treat of events thereafter, and the treatment is itself of little value. Niles's *Register*, though a periodical, is about the best record of the party, though Wilson's *Rise and Fall of the Slave Power* is more convenient. The *American Whig Review*, published monthly 1844-52, will give the party's view of its own work; and 2 A. H. Stephens's *War Between the States*, 237, will give the inside history of the party's downfall. Its platforms in full may be found in Greeley's *Political Text-Book of 1860*, 11-18. See also 2 Von Holst's *United States; North American Review*, January, 1876 (W. G. Sumner's "Politics in America"); Wise's *Seven Decades*; 8-16 Benton's *Debates of Congress*; 2 Hammond's *Political History of New York*; Sargent's *Public Men and Events*; Clay's *Works, Private Correspondence*, and Colton's *Life and Times of Clay*; Webster's *Works, Private Correspondence*, and Curtis's *Life of Webster*; Adams's *Memoir of John Quincy Adams*; Everett's *Orations and Speeches*; Seward's *Works*; Coleman's *Life of Crittenden*; Tuckerman's *Life of Kennedy*; Prentiss's *Memoir of S. S. Prentiss*; Choate's *Writings*, and Parker's *Reminiscences of Choate*; Winthrop's *Speeches and Addresses*; Cleveland's *A. H. Stephens in Public and Private*; the series of biographies in the *Whig Review*; the antagonistic authorities under Democratic Party; and authorities under articles referred to, particularly Bank Controversies, III., IV.; Internal Improvements; Abolition; Compromises, V.; Fugitive Slave Law; American Party; Republican Party.

On Loco-Focos see 2 Hammond's *Political History of New York*, 489; Byrdsell's *History of the Loco-Foco, or*



*Equal Rights, Party*; 2 Von Holst's *United States*, 396; Jenkins's *Governors of New York*, 591; 2 *Statesman's Manual* (edit. 1849), 1058 (the anti-bank portion of Van Buren's message).

On American Party see *Sons of the Sires* (anon.); 2 Wilson's *Slave Power*, 419-434; *Principles and Objects of the American Party* (anon.); Wise's *Seven Decades*; O. A. Brownson's *Essays and Reviews* (art. "Native Americanism"); Godwin's *Political Essays*; 2 Von Holst's *United States*, 523; 3 Seward's *Works*, 386-389; Bromwell's *Immigration*, 157; Knapp's *Immigration*, 228-30; *Tribune Almanac*, 1844-6, 1855-7; Clay's *Private Correspondence*, 497-520; Carroll's *Great American Battle*; Lee's *Origin and Progress of the American Party*; Whitney's *Defence of the American Policy*; Warner's *Liberties of America*; Denig's *Know-Nothing Manual*; and later authorities under Whig Party; Rhodes, vol. ii.; Schouler, vol. v.; Smith's *Political History of Slavery*; Curtis's *History of the Republican Party*. The acts of March 26, 1790, January 29, 1795, and June 18, 1798,<sup>1</sup> are in 1 *Stat. at Large*, 103, 414, 566; the act of April 14, 1802, is in 2 *Stat. at Large*, 153. Slight amendments have been made to the last-named act but without essentially changing it. By the act of March 3, 1813 (2 *Stat. at Large*, 811), five years residence was required before admission; but this was repealed by act of June 26, 1848 (9 *Stat. at Large*, 240).

On Free-Soil Party see 16 Benton's *Debates of Congress*; 1 Greeley's *American Conflict*, 191, 223; 2 Wilson's *Rise and Fall of the Slave Power*, 129, 140, 150; *International Review*, August, 1881 (G. W. Julian's "Reminiscences of the Thirty-first Congress"); Giddings's *History of the Rebellion*, 283, 357; 2 Benton's *Thirty Years' View*, 723; Schuckers' *Life of S. P. Chase*; Burgess's *Middle Period*; Woodburn's *Political Parties*

<sup>1</sup> See Alien and Sedition Laws.

*and Party Problems*, ch. vi.; Julian's *Life of Giddings*; Curtis's *History of the Republican Party*; 1 Hoar's *Autobiography*; Gardiner's *Historical Sketch of the Free-Soil Question* (to 1848); 27 *Democratic Review*, 531; *Tribune Almanac*, 1849-55; D. S. Dickinson's *Speeches*; authorities under articles referred to; the platforms of the party in full are in Greeley's *Political Text-Book of 1860*, 17, 21.

On Constitutional Union Party see 2 Coleman's *Life of Crittenden*; Botts's *Great Rebellion*; 1 Greeley's *American Conflict*, 319; and authorities under Whig Party, III.; Woodburn's *Political Parties and Party Problems*; Rhodes; Schouler; Curtis's *History of the Republican Party*; Greeley's *Political Text-Book, 1860*; Blaine's *Twenty Years*; *American Historical Review* on Bell, July, 1899.

## CHAPTER X

### THE SECESSION MOVEMENT

**F**OLLOWING the strife in Kansas, the Dred Scott decision, and the Lecompton struggle, the country began to look forward with intense interest to the political contest of 1860. Preliminary to this were the by-elections of 1858. The Lecompton debate in Congress in the winter and spring of 1858 brought out some notable speeches on the slavery question, in a debate which took a very wide range. Especially notable among these speeches was that of Benjamin, in defence of property rights in slaves, March 11, 1858, that of Collamer and of Fessenden in reply to Benjamin, and that of Seward, in which he accused Buchanan and Taney of collusion in the Dred Scott case. Lincoln had made a notable speech on the Dred Scott case, defining his party's attitude toward the decision, on June 26, 1857. On accepting his party's nomination for the Illinois Senatorship, June 16, 1858, Lincoln repeated by insinuation Seward's charge of collusion.

“ We cannot be certain of preconcert. But when we see a lot of framed timbers, different portions of which we know have been gotten out at different times and places, and by different workmen—Stephen, Franklin, Roger, and James, for instance,—and when we see these timbers neatly joined together, and see that they exactly make the frame of a house or a mill, all the tenons and mortices exactly fitting, and all the lengths and proportions of the different pieces exactly

adapted to their respective places, and not a piece too many or too few,—or if a single piece be lacking, we see the place in the frame exactly fitted and prepared yet to bring such a piece in,—in such a case we find it impossible not to believe that Stephen and Franklin and Roger and James all understood one another from the beginning, and all worked upon a common plan or draft drawn up before the first blow was struck.”

In this noted speech, at the opening of the campaign of the famous Lincoln-Douglas debates, Lincoln used the expression afterwards so frequently quoted against him by the Southern disunionists, as an evidence that emancipation in the States was intended by Lincoln’s party :

“ This Government,” said Lincoln, “ cannot endure permanently half slave and half free. I do not expect the Union to be dissolved; I do not expect the house to fall; but I do expect that it will cease to be divided. It will become all one thing or all the other. Either the opponents of slavery will arrest the further spread of it, and place it where the public mind will rest in the belief that it is in the course of ultimate extinction; or its advocates will push it forward till it shall become alike lawful in all the States, old as well as new, North as well as South.”

‘Seward, independent of Lincoln, later in the same year (October 25, 1858), in a campaign speech at Rochester, made essentially the same utterance in his famous “irrepressible conflict” speech. In this Seward said that the sectional struggle in which the country was then engaged was not “accidental or unnecessary, the work of interested or fanatical agitators. It is an irrepressible conflict between opposing and enduring forces, and it means that the United States must and will, sooner or later, become either entirely a slaveholding nation, or entirely a free-labor nation.” This utterance was denounced at the South as a “brutal and bloody manifesto,” indicative of

an intention on the part of the Republican party forcibly to wrest the Southern slaves from their masters. These utterances of Lincoln and Seward were used as apologies by the South for safeguarding their slavery interests by secession after the triumph of the Republican party in 1860.

Another notable utterance that had a tremendous influence on the politics of the times came from Douglas, drawn from him by Lincoln's searching questions in the famous Illinois debates of 1858. This was Douglas's "doctrine of unfriendly legislation" set forth at Freeport, August 27, 1858. It was an attempt by Douglas to reconcile his doctrine of popular sovereignty with loyal support of the Dred Scott decision. That was an impossible feat. Lincoln had asked Douglas: "Can the people of a Territory, in any lawful way, against the wish of any citizen of the United States, exclude slavery from its limits prior to the formation of a State constitution?" The Dred Scott decision as accepted and interpreted by the South positively denied any such power. Douglas answered by saying that

"it matters not what way the Supreme Court may hereafter decide as to the abstract question whether slavery may or may not go into a Territory under the Constitution; the people have the lawful means to introduce it or exclude it as they please, for the reason that slavery cannot exist a day or an hour anywhere unless it is supported by local police regulations. If the people are opposed to slavery, they will elect representatives to the Territorial Legislature who will by unfriendly legislation effectually prevent the introduction of it into their midst. If, on the contrary, they are for it, their legislation will favor its extension."

By this speech Douglas was able to hold the Illinois Senatorship and defeat Lincoln in 1858; but Lincoln was "gunning for larger game," and this same speech of

Douglas made impossible his support for the Presidency by the Southern Democracy, and Douglas's leadership and candidacy upon this uncertain and equivocal platform became the factor which divided the Democratic party in 1860. By the schism of the Democratic party at Charleston the last tie was sundered between the sections, and the election of a President by one section of the country alone was then made certain. It was known at the South, but not believed at the North, that secession and disunion would follow.<sup>1</sup>—ED.

The constitutional apology for the right of secession by one of the States of the American Union may be very briefly dismissed; it is entirely dependent upon the theory of State sovereignty.<sup>2</sup> Grant that the States are still individually sovereign; that their citizens owe a primary allegiance and obedience to their State, and a secondary obedience to the Federal Government because their State remains a member of the Union; that the Union is a voluntary confederacy, not a nation: and the right of secession must be admitted as a matter of course. The *advisability* of secession, the propriety of severing the ancient relations with friendly and confederate States, is entirely a matter for the State's decision: when the decision is made, every law-abiding citizen is bound by his allegiance to his State to obey it.

However fallacious the doctrine of State sovereignty and its progeny, secession, may be, there is at least this apology for the action of the seceding States in 1860–61: that the doctrine of State sovereignty, in both its premises and its consequences, had been familiar almost from antiquity; that its technical language had been used constantly, even by those who would have scouted its logical consequences, and that the system of negro slavery, with all its countless influences, had shut out the South

<sup>1</sup> See Democratic Party, 1860.

<sup>2</sup> See that title.

from that educational process which had made State sovereignty either a meaningless formula, or a political heresy, in the North and West.

It must be noticed, however, that the right of secession has never been admitted by any department of the National Government: joint or separate resolutions have been passed by the two Houses of Congress, asserting the sovereignty of the States; decisions have been made by the Supreme Court of much the same character; but the right of secession itself has never been admitted. Leaving the theory of State sovereignty to be considered under its appropriate head, it is the object of this chapter to trace the more practical idea of secession in our history: I., as a mere incident of particularism, of State sovereignty; II., as complicated with slavery; and III., in practice.

I. The union of 1643<sup>1</sup> experienced in miniature most of the perils to which the perfected and national Union was afterward exposed; nullification attacked its commercial regulations, and even put a veto on its wars; but its final disappearance was due not so much to any secession as to the inherent weakness of its nature, and the dislike of the Crown. With the introduction of the attempt at a more general union in 1754,<sup>2</sup> the idea of secession first comes plainly into view. The plan of Franklin contemplated its establishment by act of Parliament, a very unusual acknowledgment of the power of Parliament over the Colonies. In explanation of this feature of his plan, he states the various interests of the Colonies, and their jealousy of one another, and adds:

“If ever acts of assembly in all the Colonies could be obtained for that purpose, yet as any Colony, on the least dissatisfaction, might repent its own act, and thereby withdraw itself from the Union, it would not be a stable one, or such as

<sup>1</sup> See New England Union.

<sup>2</sup> See Albany Plan of Union.

could be depended on; for, if only one Colony should, on any disgust, withdraw itself, others might think it unjust and unequal that they, by continuing in the union, should be at the expence of defending a Colony which refused to bear its proportionable part, and could therefore one after another withdraw, till the whole crumbled into its original parts."

The theory of secession could hardly be more exactly stated; in its final application in practice it was only improved in one respect, the passage of the ordinances of secession by State conventions, instead of by the assemblies.

Accession to, and secession from, any union, were of course equally unconstitutional, without the King's consent, while the Colonies remained a part of the British Empire. But, as the American Revolution itself was frequently appealed to in after years, as the first great example of, and precedent for, secession, it may be well to lay stress here on one essential difference between them, that the former was an exercise of the undeniable right of revolution, a revolt of an unrepresented fraction of the empire against the usurpations of Parliament, and afterward against the King for sustaining Parliament; while the latter was attempted to be justified as a constitutional right of the States, which could not rightfully be resisted by any other State, by all the other States, or by the Federal Government. A revolt of a Territory, unrepresented in the Federal Government, against what it might consider the usurpation of the Federal Government, and its attempt to establish a separate government, might claim the American Revolution as a precedent; the seceding States in 1860-61 could not. A revolutionist hazards his life upon the issue, with the pains and penalties of treason as a possible result; a secessionist claims all the advantages of revolution, without any of its responsibilities or dangers.



Notwithstanding the early and general dissemination of the theory of State sovereignty, its practical consequence, the right of secession, was for some years unheard of, perhaps unthought of. Until 1783 the common dangers of war were a fence outside of which none of the thirteen States dared to stray; after 1783 the authority of the Congress of the Confederation was so weak a fence that none of the States cared to give it importance by formally demolishing it. The ugly word "secession" first appears in the convention of 1787, July 5th, though it then referred to the States as represented in the convention itself: Gerry remarked that, unless some compromise should be made, "a secession, he foresaw, would take place." The subsequent ratification of the Constitution by eleven of the thirteen States, on the original refusal of Rhode Island and North Carolina to ratify, has often been appealed to as a brilliant example of peaceable secession; and so it must be considered, if the ratifications were really, as they purported to be, the acts of "sovereign States."

The Articles of Confederation had expressly provided that no change should be made in them unless with the assent of the legislatures of every State; and yet, in the face of this covenant, eleven of the States not only formed a new government, but inserted in it a provision for future amendment by three fourths of the States. On the theory that the States were sovereign until the adoption of the Constitution, how can such a proceeding be anything but a secession, albeit of the majority from the minority? But another power was present in the ratification, the power which had held the States together even before the adoption of the Articles of Confederation, the sovereign power of the nation, of the national people as distinguished from the people of the State. Its non-recognition by the State conventions cannot alter the fact of its already established existence; and,

without its existence, the assumptions of the Continental Congress, from 1775 until the ratification of the Confederation in 1781, would be even a more colossal sham than the ratification of the Constitution.

The historic truth is, that the people of the nation, which had alone validated the revolutionary acts of the Continental Congress, and which had tolerated the Articles of Confederation, had now at last interposed to bring order out of chaos; that it was disposed to deal very tenderly with the rights and even with the prejudices of the peoples of the several States; that it chose to maintain State lines in the ratifications; but that, when nine of the States, including a heavy majority of the territory, wealth, and population of the nation, had expressed their decision in favor of the new form of government, factious opposition was to cease.

It is true that the status of the possible non-ratifying States was carefully ignored everywhere, as being what the *Federalist* called a "delicate question"; but it is impossible to suppose that two, or even four, recalcitrant States would ever have been allowed to escape from the national jurisdiction. Gouverneur Morris's warning in the convention of 1787, July 5th, "This country must be united; if persuasion does not unite it, the sword will," which provoked so much contrary feeling, was the simple truth. The forms of ratification would never have been neglected; but ratification, willing or unwilling, would have been extorted from Rhode Island and North Carolina by a pressure increasing continually until finally successful. The passage of the Senate bill, May 18, 1790, to prohibit bringing goods, wares, and merchandise from the State of Rhode Island "into the United States," and to authorize a demand of arrears of money from the said State, is a fair example of the sort of pressure which would have been increased indefinitely but for the ratification by the State on the 29th of the same month.

The nation has always been thus gentle and considerate in allowing the assertion of State sovereignty in non-essentials; in essentials State sovereignty must yield or be crushed.

Under the Constitution the Union was at first spared any internal dissensions of such magnitude as to suggest secession as a remedy. Projects for separation from the Union were undoubtedly on foot before 1795 in Kentucky and in western Pennsylvania<sup>1</sup>; but these were rather the product of frontier freedom from restraint than the consequence of State sovereignty. Soon after 1795 a series of articles were published in the *Connecticut Courant*, urging "the impossibility of union for any long period in the future," and laying down the permanent dogma that "there can be no safety to the Northern States without a separation from the Confederacy." These letters met no general approval in the North, and the election of Adams to the Presidency in 1796 took away for the time their moving cause, a fear of Southern domination in the Federal Government. The idea of State sovereignty, with secession as a possible consequence, next appeared, on the other side of Mason and Dixon's line, in 1798.<sup>2</sup>

The author of the Kentucky Resolutions, Jefferson, explains his feeling on the subject of secession at some length in his letter of June 1, 1798, to John Taylor:

"If, on a temporary superiority of the one party, the other is to resort to a scission of the Union, no Federal Government can ever exist. If, to rid ourselves of the present rule of Massachusetts and Connecticut, we break the Union, will the evil stop there? Suppose the New England States alone cut off, will our natures be changed? Are we not men still to the south of that, and with all the passions of men? Immediately we shall see a Pennsylvania and a Virginia party arise in the

<sup>1</sup> See Whiskey Insurrection.

<sup>2</sup> See Kentucky Resolutions.

residuary confederacy. If we reduce our Union to Virginia and North Carolina, they will end by breaking into their simple units. Seeing that we must have somebody to quarrel with, I had rather keep our New England associates for that purpose."

The objections, it will be noticed, lie to the advisability, not to the right, of secession. This defect, however, was common to most of the public men of the time: and for years afterward State sovereignty, with all its consequences, was the first refuge of a minority.

The existence of the nation was hardly recognized, even by the courts, for twenty years after 1798, though its existence was not often denied in such plain language as that employed by Tucker, in his edition of Blackstone in 1803. After summing up, to his own satisfaction, the proofs that Virginia had always been a sovereign State, and enumerating the powers which Virginia had delegated to the Federal Government, he thus concludes:

"The Federal Government, then, appears to be the organ through which the united republics communicate with foreign nations and with each other. Their submission to its operation is voluntary: its councils, its engagements, its authority, are theirs, modified and united. Its sovereignty is an emanation from theirs, not a flame by which they have been consumed, nor a vortex in which they are swallowed up. Each is still a perfect State, still sovereign, still independent, and still capable, should the occasion require, to resume the exercise of its functions, as such, to the most unlimited extent. But, until the time shall arrive when the occasion requires a resumption of the rights of sovereignty by the several States (and far be that period removed when it shall happen), the exercise of the rights of sovereignty by the States individually is wholly suspended, or discontinued, in the cases before mentioned; nor can that suspension ever be removed, so long as the present Constitution remains unchanged, but by the

dissolution of the bonds of union: an event which no good citizen can wish, and which no good or wise administration will ever hazard."

Herein is contained, for the first time, the sum and substance of the doctrine of secession.

When the idea of secession next appeared, it was again in the North, and closely connected with the question on which it was finally put into practice in the South, the Territories of the United States. The acquisition of Louisiana, in 1803, was very objectionable to the Federalist politicians of New England. They had been beaten in the contest with the South alone: to re-enforce the Southern line of battle with six, nine, or a dozen future States, peopled by "the wild men on the Missouri," seemed simply suicidal, a condemnation of New England to perpetual nullity. They therefore resisted the annexation to the utmost, and claimed that, as the Constitution was made only for the original territory comprised within the United States, an extension of territory was unconstitutional without the consent of all the States. "Suppose, in private life, thirteen men form a partnership, and ten of them undertake to admit a new partner without the concurrence of the other three, would it not be at their option to abandon the partnership after so palpable an infringement of their rights? How much more so in the political partnership."

The annexation was consummated; but it was not until January 14, 1811, on the enabling act for the first of the dreaded new States, Louisiana, that Quincy, of Massachusetts, fairly declared, in the House, the Federalist conception of its consequences. "It is my deliberate opinion, that, if this bill passes, the bonds of this Union are virtually dissolved; that the States which compose it are free from their moral obligations; and that, as it will be the right of all, so it will be the duty

of some, to prepare definitely for a separation, amicably if they can, violently if they must." Quincy was called to order, but the House decided that he was in order. Ex-President Adams, in reply to a copy of the speech, could only say that "prophecies of division had been familiar in his ears for six and thirty years."

In the meantime the opposition to the Democratic administration, confined chiefly to the New England politicians on the annexation question, had become more popular with the introduction of the restrictive system.<sup>1</sup> It is beyond question that some project of secession had been mooted in New England in 1803, though probably confined to a very few; and that Burr's candidacy for Governor of New York in 1804 was a part of it. By taking in the great State of New York, and by yielding the leadership-in-chief to a New York Democrat, who was highly popular with the Democrats of New England, it was hoped that a new republic might be formed, compact, homogeneous, and strongly defended by nature in every direction. Burr's defeat had much to do with the failure of this project, but the indifference of the people of New England probably more. The strong and general popular feeling which was aroused by the embargo revived the project. How many took part in it is uncertain; they were probably very few.

The whole truth is probably expressed in a letter of Joseph Story, afterward Supreme Court Justice, January 9, 1809: "I am sorry to perceive the spirit of disaffection in Massachusetts increasing to so high a degree; and I fear that it is stimulated by a desire, in a very few ambitious men, to dissolve the Union." Henry's letter, of March 7, 1809, goes further, and details the Federalist programme as follows: that, in the event of war, "the Legislature of Massachusetts will declare itself permanent until a new election of members; invite a congress, to

<sup>1</sup> See Embargo, III.

be composed of delegates from the Federal States; and erect a separate government for their common defence and common interest." Henry's assertions, however, are usually only proof that the contrary is the truth, and that is probably the case here. It is only certain that the accounts of the feeling in the Eastern States, as given by John Quincy Adams and Story, caused a panic among the Democratic leaders, and ended the embargo.

During the War of 1812 the feeling in New England grew still higher. Ultra Federalists undoubtedly used language aiming directly at secession; the student will find a large collection of such utterances in Carey's *Olive Branch*, as cited among the authorities. Indiscreet references to "the New England nation," occasional flauntings of a flag with five stripes and stars, the firing of "New England national salutes" of five guns, and other similar indications, when combined with the general discontent in New England,<sup>1</sup> kept the Administration in a chronic state of alarm.

The discussion of secession in any form by the Hartford Convention has been denied by its president and secretary; its journal shows no trace of it; and Mr. Goodrich has collected every available proof to the contrary. It appears certain that no such active design was considered or desired by its members; but a few of the opening sentences of its report are at least suggestive.

"If the Union be destined to dissolution, by reason of the multiplied abuses of bad administrations, it should, if possible, be the work of peaceable times and deliberate consent. Some new form of confederacy should be substituted among those States which shall intend to maintain a federal relation to each other. But a severance of the Union by one or more States, against the will of the rest, and especially in a time of war, can be justified only by absolute necessity."

<sup>1</sup> See Convention, Hartford.

The report concluded by advising, that, if no attention should be paid to their remonstrances, and the war should continue, a new convention should be called in the following June, "with such powers and instructions as the exigency of a crisis so momentous may require."

With the close of the War of 1812 the first period of the history of secession ends. It continued immanent in the doctrine of State sovereignty; but nothing occurred to call it to active life. It was threatened as a possible alternative to its illegitimate brother, nullification,<sup>1</sup> but was never enforced. Secessionists proper in South Carolina had a contempt for nullification, and composed the so-called "Union party" of 1831-3 in that State. Indeed, Jackson's nullification proclamation was offensive to them, as laying down "the tyrannical doctrine that we have not even the right to secede."

II. Throughout its subsequent history secession is always connected with slavery or the opposition to slavery. The right to secede, after it had been completely formulated by Tucker in 1803, was asserted again and again for the next thirty years, but always as a mere particularist formula, a corollary of State sovereignty. The most striking of these, and particularly as coming from the North, is that of Judge Rawle, of Pennsylvania, in his commentaries on the Constitution, as cited below, in 1825.

"The secession of a State from the Union depends on the will of the people of such State. . . . The State legislatures have only to perform certain organical operations in respect to it. To withdraw from the Union comes not within the general scope of their delegated authority. But in any manner by which a secession is to take place, nothing is more certain than that the act should be deliberate, clear, and unequivocal; and in such case the previous ligament with the Union would be legitimately and fairly destroyed. . . .

<sup>1</sup> See that title.



In the present Constitution there is no specification of numbers after the first formation. It was foreseen that there would be a natural tendency to increase the number of States. It was also known, though it was not avowed, that a State might withdraw itself. The number would therefore be variable. Secessions may reduce the number to the smallest integer admitting combination. They would remain united under the same principles and regulations, among themselves, that now apply to the whole. For a State cannot be compelled by other States to withdraw from the Union, and therefore, if two or more determine to remain united, although all the others desert them, nothing can be discovered in the Constitution to prevent it."

It is notable that, so late as November 9, 1860, Horace Greeley upheld "the practical liberty, if not the abstract right, of secession," only insisting that the step should be taken "with the deliberation and gravity befitting so momentous an issue."

It is true that these two utterances are almost the only ones from a representative Northern man after the War of 1812 in support of the theory of secession; and that all the other utterances which have been laboriously collected are simply the expression of State feeling, of State opposition to the annexation of Texas, the Fugitive Slave Law, and similar measures, without any apparent thought of the right of secession which was involved in it. Nevertheless, it is painful to consider the result which would have followed in 1860-61, if the action of the seceding States had been slow, calm, and the evident outcome of popular desire, instead of hasty, violent, and the work of the politicians. In that event, the issue of the struggle would have been painfully doubtful.

Secession came in again with Texas, whose independent existence was itself a brilliant instance of successful secession from the Mexican republic. As the probability of its annexation grew stronger, the language used in ad-

vocacy of or in opposition to it grew with it. March 3, 1843, John Quincy Adams and a few anti-slavery Whigs issued an address to their constituents, warning them that the annexation project had never been given up, and that it would result in and fully justify a dissolution of the Union. Through this and the following summer, on the other hand, "Texas or disunion" became a frequently expressed sentiment in the South, particularly in South Carolina, but this died away as the success of annexation became assured. But even this did not drive the Northern States into any action looking to secession, or a dissolution of the Union, though this was unofficially suggested. In January, 1845, at an anti-annexation convention in Boston, Wm. Lloyd Garrison urged the calling of a Massachusetts convention to declare the Union dissolved, and to invite other States to join with her in a new union based on the principles of the Declaration of Independence. "Although," says May, "his motion was not carried by the convention, it was received with great favor by a large portion of the members and other auditors, and he sat down amidst the most hearty bursts of applause." But the final annexation of Texas, operating against the feelings of the most thoroughly nationalized section of the Union, was insufficient to call forth any dangerous or even irritating desire for a dissolution of the Union. That was reserved for the question of the settlement of the new Territories.<sup>1</sup>

*Co-operation.*—The theory of secession involved the right of any State to withdraw from the Union singly; and yet the silent proof of its inherent fallacy is that single secession was never attempted, and probably never thought of. In 1847 Calhoun had endeavored unsuccessfully to obtain the "co-operation" of the slave States in the following programme: 1, the calling of a slave-State convention; 2, the exclusion of the sea-going vessels of the Northern

<sup>1</sup> See Wilmot Proviso.

States from Southern ports; 3, the prohibition of railroad commerce with the Northeastern, but not with the Northwestern, States; 4, the present maintenance of the freedom of trade on the Mississippi; 5, the continuance of this interstate embargo system until the Northwest should be "detached" from the Eastern States, and should unite with the South in opening the new Territories to slavery.

Calhoun's programme opened the way, however, for a bolder idea of "co-operation" in 1850, according to which a number of slave States were to secede in company, for mutual defence, if any prohibition of slavery in the new Territories should be enforced. But the Southern States held to the resolutions of the Georgia State convention of 1850, declaring that the State accepted the Compromise of 1850, but would resist, even to secession, such anti-slavery legislation as the abolition of slavery in the District of Columbia, or in the Territories, or of the interstate slave-trade. There can be no doubt that South Carolina was ready to secede in 1850, but not alone. Her State convention of April 26, 1852, declared her right to secede, but forbore to exercise it, out of deference to the wishes of other slaveholding States, that is, because no other slaveholding State wished to secede with or after her. Co-operation was, therefore, never practically attempted, because of the Compromise of 1850, by which the Wilmot Proviso was really enforced in California, by its admission as a free State, while nothing was said of it in the organization of the Territories of Utah and New Mexico, and the Fugitive Slave Law was accepted by the South as a make-weight.<sup>1</sup> But, though this attempt at secession by a section was unsuccessful, there had grown up an alienation between the North and the South which boded no good for the future.

Calhoun's last speech in the Senate, March 4, 1850,

<sup>1</sup> See Compromises.

described the manner in which many of the multitudinous cords that bound the Union together had already snapped. Of the five great Christian denominations which had been national in their organization, two, the Methodists and Baptists, had split into two sectional parts; and the Presbyterians were evidently close to the point of division. Political bonds were also stretched almost to breaking, and their preservation depended on the willingness of the Northern States to satisfy the South by not excluding slavery from the Territories. "If you," says Calhoun, "who represent the stronger portion, cannot agree to settle the great questions at issue on the broad principle of justice and duty, say so; and let the States we both represent agree to separate and depart in peace. If you are unwilling we should part in peace, tell us so, and we shall know what to do." The last sentence shows the remarkable underlying consciousness in every advocate of secession, of the truth so forcibly stated by Webster three days afterward: "Secession! Peaceable secession! Sir, your eyes and mine are never destined to see that miracle. The dismemberment of this vast country without convulsion! The breaking up of the fountains of the great deep without ruffling the surface! Peaceable secession is an utter impossibility."

This underlying consciousness that secession meant war was for some time sufficient to make any attempt at open secession hopeless *ab initio*, and no such attempt was made. Indeed, the South had been very well satisfied with the Compromise of 1850; and the impediments to the execution of the Fugitive Slave Law,<sup>1</sup> while they excited great discontent in the South, were not commonly looked upon as reasonable cause for secession. The final causes were three in number, with a supplementary cause, "coercion," which will be stated in the next section.

<sup>1</sup> See Fugitive Slave Law, Personal Liberty Laws.

1. Nothing was more noteworthy in the extreme Southern States than the sudden development of large estates, the freezing out of small planters, and their emigration after the absorption of their property. "In a few years large estates are accumulated as if by magic." In large sections of each State the population consisted almost wholly of negroes, with the few whites owning or managing them. But in all these States representation was on the basis of the "Federal population": that is, three fifths of the negroes were represented, while the voting and office-holding pertained to the few whites. Thus, apart from the natural influence belonging to the wealthy class of the population, the counties in the "black belt" were practically the pocket boroughs of the slave-owners therein. These thus held far more than their share of power in State legislatures and conventions, and in some States absolutely controlled them. With every year, from 1850 to 1860, the power of this class was growing stronger, and their desire for secession for the protection of their property in slaves was not weakened.<sup>1</sup>

2. But there was still another and much larger class in the South, owning few or no slaves, not wedded to the protection or extension of slavery, but high-spirited, and determined not to submit to oppression, or, above all, to the evasion of a fair compromise. The results of the passage of the Kansas-Nebraska Bill<sup>2</sup> served to bring these into the secession programme. They had never asked for the abrogation of the Missouri Compromise; but, when it had been abrogated by fair agreement, it seemed to them an unworthy evasion to turn Kansas and Nebraska into free States by organized, not voluntary and natural, emigration from the North. This was the class to which was addressed the argument which A. H. Stephens says carried Georgia, the

<sup>1</sup> See Slavery, IV.

<sup>2</sup> See that title.

keystone of a successful secession, out of the Union: "We can make better terms out of the Union than in it."

3. The Harper's Ferry insurrection had a silent influence everywhere. Those who desired secession were active, persevering, and in earnest; those who did not, were at the best negative; for they saw one great chance of good, even in a successful secession, a release from national association with future John Browns, and the ability to protect themselves from such invasions by open and national warfare.

With so many influences at work in its favor, it is matter for wonder that secession in 1860-61 was only forced through by the influence of the first two classes over the delegates to the State conventions, and that the popular demand for secession was so conspicuous by its absence that the conventions, except in Texas, did not venture to submit their ordinances to popular vote. For, in a popular vote, be it remembered, the "Federal representation" disappeared; only the votes of the whites went for anything; and the total vote of the State might very easily show that their nominal representatives did not really represent them. There must have been an enormous mass of Union feeling in the South, blind, leaderless, and rendered powerless first by the belief that their primary allegiance was due to the State, and then by the organization of the new national government at Montgomery, but still genuine and hearty.

III. The threat that secession would have followed Frémont's election, in 1856, was probably only an electioneering device. When his election seemed probable, Governor Wise, of Virginia, called a meeting of Southern governors at Raleigh, for October 13th; but only three governors appeared, those of Virginia, North Carolina, and South Carolina, and these did nothing. The meeting was of some influence, however, upon the Northern

vote.<sup>1</sup> Practical secession was hardly as yet possible. The alienation between the sections was not yet sufficient; and the power of the secessionist class over the State conventions was not yet great enough. Four years made a great difference in both respects. In December, 1860, Senator Iverson, of Georgia, pictured the situation in the Senate thus:

“ There are the Republican Northern Senators on that side. Here are the Southern Senators on this side. How much social intercourse is there between us? You sit on that side, sullen and gloomy; we sit on ours with portentous scowls. Yesterday I observed there was not a solitary man on that side of the chamber came over here, even to extend the civilities and courtesies of life; nor did any of us go over there. Here are two hostile bodies on this floor, and it is but a type of the feeling that exists in the two sections. We are enemies as much as if we were hostile states. I believe the Northern people hate the South worse than ever the English people hated France; and I can tell my brethren over there that there is no love lost on the part of the South.”

From this picture, the fact is carefully eliminated that the Southern Senators represented, not the Southern people, but its slaveholding class; but, even barring this defect, the picture is well worthy of study. With such a tightly strained tension of inter-state relations between the governments of the two sections, the real feeling of the people was a matter of but secondary importance, and there was but little need of open threats of secession in case of Lincoln's election. Such threats were undoubtedly made, but unofficially; and the question of secession played no formal part in the campaign of 1860.

The whole Congress of 1859-61 was inundated by threats of secession in the event of the election of Seward as President in 1860, the object seeming to be to commit

<sup>1</sup> See Republican Party, I.

the Southern people to that policy beyond the possibility of an honorable withdrawal. It has been asserted that the disruption of the Democratic party, in 1860, was contrived by the secessionist class for the purpose of insuring Lincoln's election, and thus obtaining an excuse for secession; but such a design is very doubtful.<sup>1</sup> The more natural explanation of their course is in their hope that the electoral vote would be so divided up as to give no candidate a majority; that the choice of the President would thus go to the House of Representatives; and that they would there be able to obtain the election of either Breckinridge or Bell. That their hopes had some foundation may be seen from the facts that the opposition to Lincoln, after his election, still controlled both Houses of Congress; and that the Republicans, throughout the whole Rebellion, were indebted for their majority in Congress to the voluntary absence of the Southern delegations.

As it resulted, however, Lincoln obtained the electoral votes of all the Northern and Western States, with the exception of a part of New Jersey's vote, and was elected beyond cavil. What was to be the next step in the political game? Were the Southern States to go on debating about co-operation, without taking any practical steps toward secession, until the popular impression caused by Lincoln's election had worn off, and his administration was found to be nothing out of the ordinary? In that case, the idea of secession might as well be laid permanently on the shelf, with other worn-out political stage thunder. The Southern politician class felt that, rather than give up what they had grown accustomed to consider the only life-preserver of their section, or rather of slavery, they would prefer to go over the cataract with it.

Nevertheless, there remained that dread of the practical

<sup>1</sup> See Democratic Party, V.



attempt to secede by a single State, which was always the surest internal condemnation of the whole theory of secession. Governor Gist, of South Carolina, had already sent a circular letter to the other Southern governors, October 5, 1860, asking their advice and plans. His State, he said, would secede with any other State, if Lincoln should be elected; or she would secede alone, if she should receive assurances that any other State would follow her; "otherwise, it is doubtful." Not one governor answered that his State would secede alone. Florida, Alabama, and Mississippi would secede with any other State; North Carolina and Louisiana would probably not secede at all; Georgia would wait for some overt act. At first sight, these answers seem discouraging; but there was hope in them. If three States were only waiting for a leader, South Carolina would take the plunge, though the gallantry of the act is considerably diminished by this preliminary probing for assurances of support. A movement begun even by four States would probably swing the other Gulf States; any attempt at "coercion" by the Federal Government would bring the border States; and the Confederacy of the slave States would then be complete.

The South Carolina Legislature, which chose presidential electors until 1868, was in session to choose them, November 6, 1860, and remained in session until Lincoln's election was assured. It then called a State convention, made appropriations for the purchase of arms, and adjourned. The convention met at Columbia, December 17th, adjourned to Charleston, on account of an epidemic in Columbia, and there unanimously passed the following ordinance, December 20th:

"We, the people of the State of South Carolina, in convention assembled, do declare and ordain, and it is hereby declared and ordained, that the ordinance adopted by us in

convention, on the 23d day of May, in the year of our Lord 1788, whereby the Constitution of the United States was ratified, and also all acts and parts of acts of the General Assembly of this State ratifying amendments of the said Constitution, are hereby repealed; and that the Union now subsisting between South Carolina and other States, under the name of the United States of America, is hereby dissolved."

On the 24th a declaration of causes for secession was adopted. It recapitulated the arguments in favor of State sovereignty and the right of secession, and assigned as a cause for immediate secession the general hostility of the Northern States to the South, as shown in their union under a sectional party organization, and in their refusal to execute the fugitive slave laws<sup>1</sup>; and it concluded with an imitation of the closing paragraph of the Declaration of Independence. On the same day the Governor by proclamation announced the fact of secession. Having adopted ordinances to enforce the existing laws of the United States for the present under State authority, to transfer to the Legislature the powers hitherto exercised by the Federal Government, to make the State ready for war, and to appoint commissioners to form, if possible, a permanent government for all the States which should secede, the convention adjourned, January 5, 1861. The action of the State then ceases to relate to secession, and falls under other heads.<sup>2</sup>

The action of Georgia comes second in importance politically, if not chronologically; for the rank, wealth, and position of the State would have made its persistent refusal to secede a most annoying brake on the secession programme. The Legislature called a State convention, November 18, 1860, and the whole struggle took place on the election of delegates. There was hardly any denial of the right of secession; but a strong State party, under the lead of Alexander H. Stephens, warmly denied

<sup>1</sup> See Personal Liberty Laws.

<sup>2</sup> See Confederate States, Rebellion.

the advisability of secession. The convention met at Milledgeville, January 17, 1861, and on the following day, by a vote of 165 to 130, declared it to be the right and the duty of the State to secede. This really settled the question. January 19th, the formal ordinance of secession was adopted by a vote of 208 to 89. In order to maintain the position of the State, every delegate but six signed the ordinance; and these six yielded so far as to pledge themselves to the defence of the State. After passing the other necessary ordinances for a transfer of powers from the Federal Government to the Legislature, the convention adjourned, but re-assembled in Savannah, March 7th, and on the 16th ratified the Confederate Constitution.

In Mississippi the convention was called for January 7th, at Jackson, and passed an ordinance of secession on the 9th by a vote of 84 to 15. March 30th, the Confederate Constitution was ratified by a vote of 78 to 7.

In Florida the Legislature passed the bill calling a convention, December 1, 1860, and the convention met at Tallahassee, January 3, 1861. January 10th, an ordinance of secession was passed by a vote of 62 to 7.

In Alabama the election for delegates was ordered by the Governor, and the convention met at Montgomery, January 7, 1861. January 11th, an ordinance of secession was adopted by a vote of 61 to 39. March 13th, the Confederate Constitution was ratified.

In Louisiana the Legislature, December 11, 1860, passed the bill calling a convention, and it met at Baton Rouge, January 23, 1861. January 26th, an ordinance of secession was adopted by a vote of 113 to 17, and on March 21st the Confederate Constitution was ratified. Louisiana was the only original seceding State in which the popular vote for delegates was a close one. It is stated at 20,448 for, and 17,296 against, immediate secession.

In Texas, secession was forced through with great difficulty, and altogether as a revolution. The Governor refused to call an extra session of the Legislature until, early in January, 1861, he found that steps were being taken to call it together without his authority. He then summoned it for January 22d. But this gave very little time for the passage of a convention bill, the election of delegates, and the meeting of the convention. An entirely unofficial call was therefore issued, delegates were elected, and the convention met at Austin, January 28th. February 1st, an ordinance of secession was passed by a vote of 166 to 7; but, as the convention itself was entirely without any basis of law, the ordinance was to be submitted to popular vote, February 23d. The Legislature, February 4th, validated the convention, apparently with a view to overriding a possibly adverse popular majority. The popular vote was reported to the convention as 34,794 for the ordinance, and 11,235 against it. But even before the popular ratification, the convention had appointed delegates to the Confederate Congress, February 11th, and the Federal troops in the State had been captured and paroled. The Confederate Constitution was ratified March 23d. One week before that day the convention had declared vacant the office of Governor Sam Houston, who had shown no inclination to favor the convention or its purposes.

These seven States, South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas, were the original seceding States; and the details of their action seem to show that the first three named were the only ones in which convention action represented the majority of the white voters. In Georgia and Louisiana the result was due to the lack of any abiding principle in the unionist representatives for resistance to the earnest body of secessionists; in Alabama, to the control of the convention by the Southern portion, or "black belt"; and

in Texas, to the revolutionary action of the secessionist politicians. These considerations, however, are not of much practical importance, for in all the States unionists and secessionists alike acknowledged the abstract right of secession, the citizen's paramount allegiance to his State, and the unconstitutionality of "coercion" by the Federal Government. The secession of even a single State, and an attempt to coerce it, would therefore have brought about the secession of the other States named, as it afterward did in the cases of Arkansas, Tennessee, North Carolina, and Virginia.

*Coercion.*—It is noteworthy that originally the most extreme particularists had the least objection to the coercion of a State by the Federal Government. In writing to Monroe, August 11, 1786, Jefferson says: "There never will be money in the Treasury till the Confederacy shows its teeth. The States must see the rod: perhaps it must be felt by some one of them. . . . Every rational citizen must wish to see an effective instrument of coercion, and should fear to see it on any other element than the water." And still more fully, August 4, 1787: "It has been so often said as to be generally believed, that Congress have no power by the Confederation to enforce anything, for example, contributions of money. It was not necessary to give them that power expressly; they have it by the law of nature. When two parties make a compact, there results to each a power of compelling the other to execute it." This was the general ground on which the Democratic members of Congress, in 1861-5, while still holding the Constitution to be a "compact," voted for the prosecution of the war. It may also explain the reason why both the Virginia and New Jersey plans in 1787<sup>1</sup> included a power to coerce disobedient States; and why Madison and others in the convention wished to give the Federal Gov-

<sup>1</sup> See Convention of 1787.

ernment an absolute veto on the legislation of State governments, to remove the necessity for any forcible "coercion."

Either of these plans would have been hazardous. Madison himself said that "the use of force against a State would look more like a declaration of war than an infliction of punishment, and would probably be considered by the party attacked as a dissolution of all previous compacts by which it might be bound." This expression, justified as it is by common-sense, has often been quoted as a condemnation of "coercion." But it must be noted that no such "use of force against a State" was ever authorized by the Constitution. That instrument gave an indirect and far safer power of coercion, 1, in the case of States, by extending the power of the Federal judiciary to State laws involving the construction of the Constitution<sup>1</sup>; and 2, by giving the power to compel individuals to obey the Federal Government in any conflict with the State.

Nevertheless the opinion was strangely prevalent in 1860-61, that, because Congress had no power to "coerce" a State, secession could not be interfered with. The simplest argument for this view can be found in President Buchanan's message of December 3, 1860. It was the main encouragement to secession by a single State; it was announced again and again by the border States during the winter of 1860-61; and the consciousness of its general existence threw the Lincoln Administration at first altogether upon the defensive. It was not until the popular uprising in the North had taught the Administration what States it could rely upon that the Federal Government was encouraged to begin the work of coercion by exercising its power to execute the laws and suppress insurrection by means of the armed militia. From that time coercion took the form of repression of

<sup>1</sup> See Judiciary, I.

individual resistance, the Federal Government ignoring the action of the State as entirely *ultra vires*.

This is the form which coercion took in its first operation in our history, the "force bill" of 1833,<sup>1</sup> and which it must always take. If a State should see fit to form a treaty with a foreign power, the Federal Government would ignore such action, and would compel individuals to ignore it also, by the use of the courts in cases of mild resistance, and of the army and navy in case of resistance by force. This process of "coercion" could hardly be better stated than in a pamphlet cited below, by Gov. H. A. Wise, of Virginia, published in 1859, though aimed at a very different object. He supposes the State of Vermont gradually coming to forcible resistance against the execution of the fugitive slave laws, her State convention making the arrest of a slave felony, and her magistrates and officers resisting the Federal writs of *habeas corpus* by force.

"The President must then command a sufficient force of the army or navy or militia of the United States to overcome the rebellion and treason; and that would not be all. The jailor and judges and governor of Vermont, and all persons guilty with them of rebellion against the faithful execution of the laws of the United States, would have to be arrested and tried according to law, or, if their resistance were serious enough to require it, to be slain in battle or rebellion against the laws of the Union. And I am sure, that, if civil war should thus be brought on to battle and carnage, every patriot and lover of the laws would march to the order of coercing a State, to compel her authorities and her people to obey the supreme laws, to lay down their weapons, and to renounce the State laws and ordinances commanding their rebellion."

Voluntary secession had really spent its force in carrying Georgia, Alabama, Louisiana, and Texas with it;

<sup>1</sup> See Nullification.

but it relied on carrying the other slave States with it on the plea of resistance to coercion, when President Lincoln should call for troops to enforce the laws. In two of them it succeeded fairly: Arkansas passed an ordinance of secession May 6th, and North Carolina May 20th. In Virginia and Tennessee another plan had to be adopted. The convention, while nominally submitting the ordinance of secession to popular vote, first formed "military leagues" with the Confederate States; Confederate troops at once swarmed over their territory; and under their auspices the popular vote became a farce. In this way Virginia's ordinance was ratified May 23d, and Tennessee's June 18th. Here the current stopped: in Maryland, Kentucky, and Missouri much the same plan was tried as in Texas, but it was a failure.<sup>1</sup> In Delaware alone of the slave States, secession seems to have had no advocates.

The United States Supreme Court has finally decided that the ordinances of secession were entirely void, and that a State government steps out of its sphere when it undertakes to organize armed resistance to the Federal Government. Reconstruction by Congress does not seem to have been founded on the notion that the ordinances of secession had so far taken the States out of the Union as to require their readmission, but on the theory that the State governments had either been vacated by the fault of the individual citizens of the State, or had been seized upon by usurpers; that in either case the reconstruction must be under the authority of the Federal Government; and that individuals who had been guilty of treason were estopped from objecting to the methods which Congress might see fit to employ.<sup>2</sup>

Finally, the suppression of the doctrine of secession by force has established the political existence of the nation, as distinguished even from *all* the States. It has done

<sup>1</sup> See those States.

<sup>2</sup> See Reconstruction, I.



so, not by the facts that all the seceding States, in their new constitutions, expressly disavowed any right of secession, and declared the primary allegiance of the individual citizen to be due to the United States; but by the higher fact that the nation has plainly expressed and successfully enforced its will in the matter. For the future, all men are bound to take notice that it is the nation that wills that there should be State governments, and not States which will that there should be a National Government. The ultimate results of secession in this way no man can foresee.<sup>1</sup>

The theory of the right of secession will be found in Centz's *Republic of Republics*; Fowler's *Sectional Controversy*; 1 Calhoun's *Works*, 300; 1 Tucker's *Blackstone*, Appendix, 187; 1 Stephens's *War Between the States*, 495; Rawle's *Commentaries on the Constitution*, 302; Appleton's *Annual Cyclopædia*, 1861, 614 (Davis's Message of April 29th). The study of Mr. Fisher's theory of "constitutional secession," by amicable agreement between the Federal Government and a seceding State, will also be found interesting and profitable: see Fisher's *Trial of the Constitution*, 160, 167.<sup>2</sup> See also (I.) authorities under New England Union, and Albany Plan of Union; 5 Elliot's *Debates*, 276, 278; 1 Benton's *Debates of Congress*, 172; 4 Jefferson's *Works*, edit. 1853, 111; 1 von Holst's *United States*, 196; authorities under Kentucky Resolutions; 3 Jefferson's *Works*, edit. 1830, 394; 2 Schouler's *United States*, 192; Quincy's *Life of Quincy*, 206, 210; Adams's *Documents Relating to New England Federalism* (see, under index, "Northern Confederacy"); 4 Upham's *Life of Pickering*, 53; 3 Sparks's *Writings of Gouverneur Morris*, 319; 1 Story's *Life of Story*, 182; 8 Niles's *Weekly Register*, 262; Carey's *Olive Branch*, 7th edit., 416, 449; Hunt's *Life of Livingston*, 346; authori-

<sup>1</sup> See Nation, III.

<sup>2</sup> See State Sovereignty, III.

ties under Convention, Hartford, and Nullification; (II.) 1 Greeley's *American Conflict*, 359; May's *Anti-Slavery Conflict*, 320; 2 Benton's *Thirty Years' View*, 613, 698, 733; Cox's *Eight Years in Congress*, 188; 16 Benton's *Debates of Congress*, 403, 415 (Calhoun's and Webster's speeches, March 4 and 7, 1850); 2 Olmsted's *Cotton Kingdom*, 158; (III.) Nicolay's *Outbreak of Rebellion*; 1 Draper's *Civil War*, 438, and 2 *ibid.*; Buchanan's *Administration*, 108; Greeley's *Political Text-Book of 1860*, 170; McPherson's *Political History of the Rebellion*, 2; 2 Stephens's *War Between the States*, 312; *ibid.*, 671 (South Carolina declaration of 1861); 2 Jefferson's *Works*, edit. 1830, 43, 203; H. A. Wise's *Territorial Government*, 103; Botts's *Great Rebellion*, 205, 209; Brownson's *American Republic*, 277; Story's *Commentaries on the Constitution*, edit. 1833, § 359; Mulford's *The Nation*, 334; Goodwin's *Natural History of Secession*; Hurd's *Theory of Our National Existence*.

## CHAPTER XI

### THE CONFEDERACY AND STATE SOVEREIGNTY

THE CONFEDERATE STATES was the government formed in 1861 by the seven States which first seceded. Belligerent rights were accorded to it by the leading naval powers, but it was never recognized as a government, notwithstanding the persevering efforts of its agents near the principal courts. This result was mainly due to the diplomacy of the Federal Secretary of State, Wm. H. Seward, to the proclamations of emancipation in 1862-3, which secured the sympathy of the best elements of Great Britain and France for the Federal Government, and to the obstinate persistence of the Federal Government in avoiding, so far as possible, any recognition of the existence, even *de facto*, of a Confederate government. The Federal generals in the field, in their communications with Confederate officers, did not hesitate, upon occasion, even to give "President" Davis his official title, but no such embarrassing precedent was ever admitted by the Civil Government of the United States. It at first endeavored, until checked by active preparations for retaliation, to treat the crews of Confederate privateers as pirates; it avoided any official communication with the Confederate Government, even when compelled to exchange prisoners, confining its negotiations to the Confederate Commissioners of Exchange; and, by its persistent policy in this general direction, it succeeded, without any formal declaration, in impressing upon for-

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eign governments the belief that any recognition of the Confederate States as a separate people would be actively resented by the Government of the United States as an act of excessive unfriendliness.<sup>1</sup>

The Federal courts have steadily held the same ground, that "the Confederate States was an unlawful assemblage, without corporate power"; and that, though the separate States were still in existence and were indestructible, their State governments, while they chose to act as part of the Confederate States, did not exist, even *de facto*.

Early in January, 1861, while only South Carolina had actually seceded, though other Southern States had called conventions to consider the question, the Senators of the seven States farthest south practically assumed control of the whole movement; and their energy and unswerving singleness of purpose, aided by the telegraph, secured a rapidity of execution to which no other very extensive conspiracy of history can afford a parallel. The ordinance of secession was a negative instrument, purporting to withdraw the State from the Union and to deny the authority of the Federal Government over the people of the State; the cardinal object of the senatorial group was to hurry the formation of a new national government, as an organized political reality which would rally the outright secessionists, claim the allegiance of the doubtful mass, and coerce those who still remained recalcitrant.

At the head of the senatorial group, and of its executive committee, was Jefferson Davis, Senator from Mississippi, and naturally the first official step toward the formation of a new government came from the Mississippi Legislature, where a committee reported, January 19, 1861, resolutions in favor of a congress of delegates from the seceding States to provide for a Southern Confederacy, and to establish a provisional government therefor.

<sup>1</sup> See Secession, Emancipation Proclamation, Alabama Claims.

The other seceding States at once accepted the proposal, through their State conventions, which also appointed the delegates on the ground that the people had intrusted the State conventions with unlimited powers. The new government, therefore, began its existence without any popular representation, and with only such popular ratification as popular acquiescence gave.<sup>1</sup>

The provisional congress met, February 4th, at Montgomery, Ala., with delegates from South Carolina, Georgia, Alabama, Louisiana, Florida, and Mississippi. The Texas delegates were not appointed until February 14th. February 8th, a provisional constitution was adopted, being the Constitution of the United States, with some changes. February 9th, Jefferson Davis, of Mississippi, was unanimously chosen provisional President, and Alexander H. Stephens, of Georgia, provisional Vice-President, each State having one vote, as in all other proceedings of this body. By acts of February 9th and 12th the laws and revenue officers of the United States were continued in the Confederate States until changed. February 18th, the President and Vice-President were inaugurated. February 20th–26th, executive departments and a Confederate regular army were organized, and provision was made for borrowing money. March 11th, the permanent constitution was adopted by congress. It generally follows the Constitution of the United States, substituting "Confederate States" for "United States," "Confederacy" for "Union," and (in Art. VI.) "provisional government" for "Confederation."

The other changes are as follows:

*(Preamble):* "We, the people of the Confederate States, each State acting in its sovereign and independent character, in order to form a permanent federal government, establish justice, insure domestic tranquillity, and secure the blessings of liberty to ourselves and

<sup>1</sup> See Declaration of Independence.

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our posterity—invoking the favor and guidance of Almighty God—do ordain and establish this constitution for the Confederate States of America.”

(Art. I.): In § 1, “delegated” is substituted for “granted.” In § 2, ¶ 1, the words “be citizens of the Confederate States, and” are added after the words “the electors in each State shall.” In § 2, ¶ 3, “fifty thousand” is substituted for “thirty thousand”; “slaves” is substituted for “other persons”; and the following change is made in the conclusion: “the State of South Carolina shall be entitled to choose six, the State of Georgia ten, the State of Alabama nine, the State of Florida two, the State of Mississippi seven, the State of Louisiana six, and the State of Texas six.” In § 2, ¶ 5, there is added: “except that any judicial or other Federal officer, resident and acting solely within the limits of any State, may be impeached by a vote of two thirds of both branches of the Legislature thereof.” In § 4, ¶ 1, the words “subject to the provisions of this constitution” are added after the word “thereof”; and there is substituted “times and places” for “place.” In § 6, ¶ 1, the word “felony” is omitted. In § 6, ¶ 2, there is added: “But Congress may, by law, grant to the principal officer in each of the executive departments a seat upon the floor of either House, with the privilege of discussing any measure appertaining to his department.” In § 7, ¶ 2, there is added: “The President may approve any appropriation and disapprove any other appropriation in the same bill. In such case he shall, in signing the bill, designate the appropriations disapproved; and shall return a copy of such appropriations, with his objections, to the House in which the bill shall have originated; and the same proceedings shall then be had as in case of other bills disapproved by the President.” In § 8, ¶ 1, there is inserted “for revenue necessary,” before the words “to pay,” and instead of the words “and general welfare of

the United States; but" there is substituted the following: "and carry on the government of the Confederate States; but no bounties shall be granted from the Treasury, nor shall any duties or taxes on importations from foreign nations be laid to promote or foster any branch of industry." In § 8, ¶ 3, there is added:

"but neither this, nor any other clause contained in the constitution, shall be construed to delegate the power to Congress to appropriate money for any internal improvement intended to facilitate commerce; except for the purpose of furnishing lights, beacons, and buoys, and other aids to navigation upon the coasts, and the improvement of harbors, and the removing of obstructions in river navigation; in all which cases, such duties shall be laid on the navigation facilitated thereby, as may be necessary to pay the costs and expenses thereof."

In § 8, ¶ 4, there is added: "but no law of Congress shall discharge any debt contracted before the passage of the same." In § 8, ¶ 7, there is added: "but the expenses of the postoffice department, after the first day of March, in the year of our Lord eighteen hundred and sixty-three, shall be paid out of its own revenues." Instead of § 9, ¶ 1, there are substituted two paragraphs as follows: "1. The importation of negroes of the African race, from any foreign country, other than the slaveholding States and Territories of the United States of America, is hereby forbidden, and Congress is required to pass such laws as shall effectually prevent the same. 2. Congress shall also have power to prohibit the introduction of slaves from any State not a member of, or Territory not belonging to this Confederacy." ¶ 2 thus becomes ¶ 3, and ¶ 3 becomes ¶ 4, inserting in it "or law denying or impairing the right of property in negro slaves," after "*ex post facto* law." ¶ 4 becomes ¶ 5, and ¶ 5 becomes ¶ 6, adding thereto "except by a vote of two-thirds of both Houses." ¶ 6 becomes ¶ 7, omitting

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the last sentence, "nor shall vessels," etc. ¶ 7 becomes ¶ 8, and ¶ 8 becomes ¶ 11, two new paragraphs being inserted, as follows:

"9. Congress shall appropriate no money from the treasury except by a vote of two-thirds of both Houses, taken by yeas and nays, unless it be asked and estimated for by some one of the heads of departments, and submitted to Congress by the President; or for the purpose of paying its own expenses and contingencies; or for the payment of claims against the Confederate States, the justice of which shall have been judicially declared by a tribunal for the investigation of claims against the Government, which it is hereby made the duty of Congress to establish. 10. All bills appropriating money shall specify in Federal currency the exact amount of each appropriation and the purposes for which it is made; and Congress shall grant no extra compensation to any public contractor, officer, agent, or servant, after such contract shall have been made or such service rendered."

Amendments I.–VIII. of the Constitution are inserted as ¶¶ 12–19, and a new paragraph added, as follows: "20. Every law, or resolution having the force of law, shall relate to but one subject, and that shall be expressed in the title." In § 10, ¶ 1, the words "emit bills of credit" are omitted. In § 10, ¶ 3, there is inserted, after the word "tonnage": "except on sea-going vessels, for the improvement of its rivers and harbors navigated by the said vessels; but such duties shall not conflict with any treaties of the Confederate States with foreign nations; and any surplus of revenue, thus derived, shall, after making such improvement, be paid into the common treasury"; and there is added, at the end of the paragraph, "But when any river divides or flows through two or more States, they may enter into compacts with each other to improve the navigation thereof."

(Art. II.): In § 1, ¶ 1, instead of the second sentence,



there is inserted: "He and the Vice-President shall hold their offices for the term of six years; but the President shall not be re-eligible. The President and Vice-President shall be elected as follows." Instead of ¶ 3 of § 1 are inserted, as ¶¶ 3, 4, and 5, the three paragraphs of Amendment XII. of the Constitution. ¶¶ 4-8 thus become ¶¶ 6-10, inserting in the new ¶ 7, at the beginning: "No person except a natural born citizen of the Confederate States, or a citizen thereof at the time of the adoption of this Constitution, or a citizen thereof born in the United States prior to the 20th December, 1860, shall be eligible," etc., and adding at the end: "as they may exist at the time of his election." Before ¶ 3 of § 2 is inserted a new paragraph, as follows:

"3. The principal officer in each of the executive departments, and all persons connected with the diplomatic service, may be removed from office at the pleasure of the President. All other civil officers of the executive department may be removed at any time by the President, or other appointing power, when their services are unnecessary, or for dishonesty, incapacity, inefficiency, misconduct, or neglect of duty; and when so removed, the removal shall be reported to the Senate, together with the reasons therefor."

¶ 3 thus becomes ¶ 4, adding to it: "But no person rejected by the Senate shall be re-appointed to the same office during their ensuing recess."

(Art. III.): In § 1, ¶ 1, "supreme" is changed to "superior." The latter part of ¶ 1 of § 2 is changed to read as follows: "between a State and citizens of another State, where the State is plaintiff; between citizens claiming lands under grants of different States, and between a State or the citizens thereof, and foreign states, citizens, or subjects; but no State shall be sued by a citizen or subject of any foreign state."

(Art. IV.): In § 2, ¶ 1, there is added: "and shall have

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the right of transit and sojourn in any State of this Confederacy, with their slaves and other property; and the right of property in said slaves shall not be thereby impaired." In § 2, ¶ 2, there is inserted: "against the laws of such State," after "other crime." § 2, ¶ 3, is altered to read: "No slave or other person held to service or labor in any State or Territory of the Confederate States, under the laws thereof, escaping or unlawfully carried into another"; and the words "to whom such slave belongs; or" are inserted after "on claim of the party." In § 3, ¶ 1, instead of the first eleven words there is substituted: "Other States may be admitted into this Confederacy by a vote of two-thirds of the whole House of Representatives and two-thirds of the Senate, the Senate voting by States." In § 3, ¶ 2, the last twenty-three words are omitted, and there is substituted: "concerning the property of the Confederate States, including the lands thereof." A new paragraph is added, as follows:

"3. The Confederate States may acquire new territory; and Congress shall have power to legislate and provide governments for the inhabitants of all territory belonging to the Confederate States, lying without the limits of the several States, and may permit them, at such times and in such manner as it may by law provide, to form States to be admitted into the Confederacy. In all such territory the institution of negro slavery, as it now exists in the Confederate States, shall be recognized and protected by Congress and by the territorial government; and the inhabitants of the several Confederate States and Territories shall have the right to take to such territory any slaves lawfully held by them in any of the States or Territories of the Confederate States."

§ 4 is altered to read: "to every State that now is or hereafter may become a member of this Confederacy."

Art. V. is altered to read as follows:

"Upon the demand of any three States, legally assembled

in their several conventions, the Congress shall summon a convention of all the States, to take into consideration such amendments to this constitution as the said States shall concur in suggesting at the time when the said demand is made; and should any of the proposed amendments to the constitution be agreed on by the said convention—voting by States—and the same be ratified by the legislatures of two-thirds of the several States, or by conventions in two-thirds thereof—as the one or the other mode of ratification may be proposed by the general convention—they shall thenceforward form a part of this constitution. But no State shall, without its consent, be deprived of its equal representation in the Senate.”

(Art. VI.): For § 1, ¶ 1, a new paragraph is substituted, as follows: “1. The government established by this constitution is the successor of the provisional government of the Confederate States of America, and all the laws passed by the latter shall continue in force until the same shall be repealed or modified; and all the officers appointed by the same shall remain in office until their successors are appointed and qualified, or the offices abolished.” ¶¶ 1–3 thus become ¶¶ 2–4, and Amendments IX. and X. of the Constitution are added as ¶¶ 5 and 6.

(Art. VII.): In this article “five States” is substituted for “nine States,” and the following is added:

“When five States shall have ratified this constitution in the manner before specified, the Congress under the provisional constitution shall prescribe the time for holding the election of President and Vice-President, and for the meeting of the Electoral College, and for counting the votes and inaugurating the President. They shall also prescribe the time for holding the first election of members of Congress under this constitution, and the time for assembling the same. Until the assembling of such Congress, the Congress under the provisional constitution shall continue to exercise the legislative

powers granted them; not extending beyond the time limited by the constitution of the provisional government."

This constitution was ratified in all the States by the still existing State conventions, not by popular action. An examination of the changes which it introduced will divide them into two general classes, executive and political. Of the executive changes, intended to amend the administration of government, there are a number fairly open to discussion, some which have since been proposed for adoption by the United States, and some which have been already adopted by several State governments. The political changes were evidently not merely declarative, intended to guard against false constructions of the Constitution of 1787, but were actively remedial, intended to revive the State sovereignty of the Confederation by withdrawing complete control over commerce and internal improvements from the central government, and, further, to rest the foundations of the new government (to quote Vice-President A. H. Stephens), not upon Jefferson's "fundamentally wrong" "assumption of the equality of races," but upon "the great truth that the negro is not equal to the white man; that slavery, subordination to the superior race, is his natural and normal condition."

The Confederate constitution is, therefore, itself a public confession that Southern Democratic politicians were consciously in error from 1840 until 1860 in claiming the Constitution as the palladium of slavery; that, under the Constitution's fair construction, slavery was in truth protected by the States, not by the nation; and that "We, the people," of 1787, must be changed by violence, and not by construction, into "We, the States," of 1861.

The internal legislation of the provisional congress was, at first, mainly the adaptation of the civil service in the Southern States to the uses of the new government.

Wherever possible, judges, postmasters, and civil as well as military and naval officers who had resigned from the service of the United States were given an equal or higher rank in the Confederate service. Postmasters were directed to make their final accounting to the United States May 31st, thereafter accounting to the Confederate States. April 29th, the provisional congress, which had adjourned March 16th, reassembled at Montgomery, having been convoked by President Davis in consequence of President Lincoln's preparations to enforce Federal authority in the South. Davis's message announced that all the seceding States had ratified the permanent constitution; that Virginia, which had not yet seceded, had entered into alliance with the Confederacy, and that other States were expected to follow the same plan. He concluded by declaring that "all we ask is to be let alone." May 6th, an act was passed recognizing the existence of war with the United States. Congress adjourned May 22d, reconvened at Richmond, Va., July 20th, and adjourned August 22d until November 18th. Its legislation had been mainly military and financial. Virginia, North Carolina, Tennessee, and Arkansas had passed ordinances of secession, and been admitted to the Confederacy.<sup>1</sup> Although Missouri and Kentucky had not seceded, delegates from these States were admitted in December, 1861.

November 6, 1861, at an election under the permanent constitution, Davis and Stephens were again chosen to their respective offices by unanimous electoral vote. February 18, 1862, the provisional congress (of one House) gave way to the permanent congress, and Davis and Stephens were inaugurated February 22d. The cabinet, with the successive secretaries of each department, was as follows, including both the provisional and permanent cabinets: *State Department*—Robert Toombs,

<sup>1</sup> See the States named, and Secession.

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Ga., Feb. 21, 1861; R. M. T. Hunter, Va., July 30, 1861; Judah P. Benjamin, La., Feb. 7, 1862. *Treasury Department*—Charles G. Memminger, S. C., Feb. 21, 1861, and March 22, 1862; James L. Trenholm, S. C., June 13, 1864. *War Department*—L. Pope Walker, Miss., Feb. 21, 1861; Judah P. Benjamin, La., Nov. 10, 1861; James A. Seddon, Va., March 22, 1862; John C. Breckinridge, Ky., Feb. 15, 1865. *Navy Department*—Stephen R. Mallory, Fla., March 4, 1861, and March 22, 1862. *Attorney General*—Judah P. Benjamin, La., Feb. 21, 1861; Thomas H. Watts, Ala., Sept. 10, 1861, and March 22, 1862; George Davis, N. C., Nov. 10, 1863. *Postmaster General*—Henry J. Ellet, Miss., Feb. 21, 1861; John H. Reagan, Texas, March 6, 1861, and March 22, 1862. As has already been said, the provisional congress held four sessions, as follows: 1, Feb. 4–March 16, 1861; 2, April 29–May 22, 1861; 3, July 20–Aug. 22, 1861; and 4, Nov. 18, 1861–Feb. 17, 1862. Under the permanent constitution there were two congresses. The first congress held four sessions, as follows: 1, Feb. 18–April 21, 1862; 2, Aug. 12–Oct. 13, 1862; 3, Jan. 12–May 8, 1863; and 4, Dec. 7, 1863–Feb. 18, 1864. The second congress held two sessions, as follows: 1, May 2–June 15, 1864, and 2, from Nov. 7, 1864, until the hasty and final adjournment, March 18, 1865. In the first congress members chosen by rump State conventions, or by regiments in the Confederate service, sat for districts in Missouri and Kentucky, though these States had never seceded. There were thus thirteen States in all represented at the close of the first congress; but, as the area of the Confederacy narrowed before the advance of the Federal armies, the vacancies in the second congress became significantly more numerous. At its best estate the Confederate Senate numbered 26, and the House 106, as follows: Alabama, 9; Arkansas, 4; Florida, 2; Georgia, 10; Kentucky, 12; Louisiana, 6; Mississippi, 7;

Missouri, 7; North Carolina, 10; South Carolina, 6; Tennessee, 11; Texas, 6; Virginia, 16. In both congresses Thomas S. Bocock, of Virginia, was Speaker of the House.

The only noteworthy feature of the political history of the Confederate States was the insignificance of the legislative. The original revolutionary, or provisional, government was not the result of popular initiative, but was directly due to the energy of a senatorial clique, actively assisted by a few leading men in each State. The demoralizing influences of a great civil war, which even the solidest and most firmly based form of popular government can only imperfectly resist, were almost instantly fatal to the inchoate political character of the Confederacy. The strongest and most self-assertive spirit of the senatorial clique, having been chosen President, at once began to quarrel with his associates, and to drive them from his counsels; there was no popular strength in the provisional congress to resist him; and even before the inauguration of the permanent government, the Confederacy had become a military despotism of the executive.

The sittings of congress were almost continuously secret, and its acts, generally prepared in advance by the executive, the cabinet having seats in congress, were made conformable to his known wishes, or were interpreted by him to suit his own pleasure. As the war became more desperate, and the most capable leaders went into the army, the *morale* of congress further decayed, and this process was increased by the presence of a cohort of members from States which had never seceded, or had since been conquered, who represented no constituencies and were to a great degree dependent on the executive for their political future. The business of congress thus grew to be mainly the registering of laws prepared by the executive, the passing of resolutions to continue the war to the end, the debate of resolutions to

retaliate or to fight under the black flag, and the preparation of addresses to their constituents, whose earnestness of tone may be estimated from the following sentence in one of them: "Failure will compel us to drink the cup of humiliation even to the bitter dregs of having the history of our struggle written by New England historians."

Outside of the ordinary powers conferred by the legislative, the war powers openly or practically exercised by the executive were more sweeping and general than those assumed by President Lincoln. The Confederate treasury was held subject to executive drafts to any extent, and without audit or account; the State governments were expected to act, and State judges to decide, in conformity with the President's wishes in small or great matters, under penalty of presidential displeasure and punishment; not only individuals, but whole communities (as in East Tennessee), were held liable to summary military execution by the mere warrant of the executive; and his dictatory meddlesomeness in the management of the army was so notorious and so uniformly unfortunate that Foote, of Tennessee, did not hesitate to declare, in the House, in December, 1863, that "the President never visited the army without doing it injury—never yet, that it has not been followed by disaster."

The interferences of the committees on the conduct of the war in the Federal Congress often seemed unwarrantable or unfortunate; but they justly represented the feeling of a people bent not only upon fighting but on keeping to themselves the control of the fighting, a feeling of which there is not a trace in the brief legislative history of the Confederate States. The rout of Bull Run, and the expected advance of the triumphant enemy upon Washington, only extorted from the Federal Congress the resolve to vote every dollar and every man which the President might find necessary in suppressing



the Rebellion ; a similar state of affairs in Richmond, early in 1865, drew from the Confederate congress an angry vote that Davis's incompetency was the cause of the disasters, and a substitution of Lee as commander-in-chief with unlimited powers.

This final and spiteful exposure of its own nullity was the only known instance of entirely independent action or initiative in important matters by the permanent congress during its three years of existence. The government was merely a military despotism, very thinly clothed in the forms of law, in which parties and party politics could have no existence.<sup>1</sup>

STATE SOVEREIGNTY is the theory of the relation of the States to the Union on which was based the right of secession. It held that all the rights and powers of sovereignty were vested in the thirteen States, or commonwealths, which originally formed the American Union ; that the peoples of these commonwealths had authorized their State governments to form the Confederation in 1777-81 and the Constitution in 1787-9 ; that the peoples of the individual commonwealths thus formed a voluntary union, retaining to themselves the whole essence of sovereignty, but yielding to the new Federal Government certain of the insignia of government, previously held by the State governments ; that the people of any State, by withdrawing from the Federal Government its grant of powers, *ipso facto* dissolved the only bond which united them in a continuously voluntary union with the other States ; and that there is, and can be, no "sovereignty" in the people of *all* the States, considered as a nation, in internal affairs, and no insignia of sovereignty in foreign affairs, except what is granted to the Federal Government by the real sovereignties, the peoples of the individual commonwealths, or States.

<sup>1</sup> See Slavery, Nullification, State Sovereignty, Allegiance, Secession, Drafts, Rebellion, United States.

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The above is the doctrine of State sovereignty pure and simple, as it includes the right of secession. There is a much more popular and far milder doctrine, of which Madison was the strongest supporter: it holds that the States were sovereign until the ratification of the Constitution; and that they then ceased to be entirely sovereign, a government partly national and partly federal taking their place. A variety of the first theory was also upheld, particularly in 1861-5: it held that the States were still truly sovereign, but that their international responsibility and comity forbade them to secede even from a voluntary union on trivial grounds, and authorized the other States to war upon them and compel their return.

In considering the question it is as well to begin by examining the word sovereignty itself, though the examination must be brief. Mr. John Austin defines it thus:

“If a determinate human superior, not in the habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society, and the society (including the superior) is a society political and independent. To that determinate superior the other members of the society are subject. . . . The mutual relation which subsists between that superior and them may be styled the relation of sovereign and subject, or the relation of sovereignty and subjection.”

This carefully guarded definition evidently implies that sovereignty resides in some small class, and it will settle the question of the sovereignty of the Dukes of Burgundy in the Middle Ages, or of the Princes of Servia in modern times. But its fundamental idea must be modified in the United States, where every governmental agency is supposed to be “in the habit of obedience” to the will of the people, expressed in written constitutions.

The question for us must be, whether the people of the

State, the commonwealth, or the people of the nation has been habitually superior when it has seen fit to declare its will. This will show us whether the ultimate sovereignty, the absolute independence of action in domestic and foreign affairs, the uncontrolled power of decision in the last resort, is in the people of a State or in the national people.

No theory of the nature of the American Union can be suggested against which arguments from authority, from the declarations and opinions of leading men, legislative bodies and conventions, cannot be levied in array. The feeling of the American people has always been so strongly individualistic, their conventions and legislatures have been so much inclined to put confidence in their own assertions without regard to opposing facts, and their public men have been so influenced in feeling and language by their environment, that it is not difficult to bring arguments from authority in support of every variety of theory.

Our theory, relying on the facts of our history, and practically disregarding authority, is founded in a belief opposed to all the theories above enumerated: that the Union is not "voluntary," in the sense implied in State sovereignty; that it has always been compelled by force of circumstances, common interests, and everything that goes to develop a national will and make up a nation; that the nation has existed, by its own will maintained by arms, since the first shot was fired at Lexington; that it has since continually asserted its existence with a steadily growing certainty of success; but that the expression and assertion of its existence is limited, according to its own will and the political instincts of the people, by the controlling necessity for preserving State lines, State government, and "State rights," properly so called.<sup>1</sup> The presentation of this theory will therefore

<sup>1</sup> See Congress, Continental; Declaration of Independence.

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be confined to I, the leading arguments for State sovereignty, as advanced by its supporters; II, the historical arguments against it; and III, "State rights."

I. The word "people" is the  $x$  of American political algebra. All parties agree in the assertion that sovereignty is inherent in the people, not in the government; and in so far the unanimity of belief is almost startling, considering the diversity of results to which it has led. But the unanimity disappears as soon as we undertake to define "the people." Is it the people of all the States, of the nation, that is sovereign? Is it the people of each individual State that is sovereign? Jefferson Davis and his associates in 1861 held the latter view, and each, when the sovereign people of his State declared for secession, obeyed the behest of the only "people" known to him, even to the waging of war on the United States. The dominant party of the North and West held the former view, and justified the people of the nation, through its constituted agents, in suppressing rebellion by war. The Democratic party of the North and West generally supported the war measures of the Government, but did so on the ground of the third doctrine above mentioned, that the Government was the agent of the non-seceding States in offsetting by war the unfriendly act of secession. If the doctrine of State sovereignty is correct, if each individual State is the only nation which its citizens can know, the Southern States in 1860-61 undoubtedly exercised a constitutional and inalienable right in seceding, if they believed that the welfare of their citizens and their own preservation would be imperilled by remaining in the Union; and the suppression of the Rebellion was a revolutionary transformation of a voluntary into an involuntary Union. And the argument of Southern writers in favor of State sovereignty is, in general, as follows:

1. They direct attention to the slow and steady growth of the States along the Atlantic coast, the nucleus of each

being widely separated from the others, and none of them ever mingling with its neighbors or losing its own identity; to the fact that each had its distinct government, the King being the common executive; and they conclude that when the connection between the Colonies and the King was "severed by rebellious swords, each Colony became a living soul, and each necessarily possessed sovereign political will over its own territory and people." In support of this assertion their appeals are mainly to authority; and if this form of argument could be accepted as conclusive, the doctrine of State sovereignty would be very strong. The word "people," as used at the time, was almost invariably applied to the people of a State; and the people of all the States are loosely referred to as "the continent," "the generality," "America in general." When independence was finally declared, the instrument was carefully entitled "The unanimous declaration of the thirteen united [*sic*] States of America," showing that "thirteen independent wills became unanimous on the great occasion"; and in declaring the independence of "the States," these bodies are always referred to in the plural: "that as Free and Independent States they have full Power to levy War, conclude Peace, contract Alliances, Establish Commerce, and to do all other Acts and Things which Independent States may of right do." The idea may be indicated by the full title of Dr. Ramsay's *History of the Revolution of South Carolina from a British Province to an Independent State*. And the language of the constitutions adopted by the several States during the revolutionary period is even stronger in the same direction. "The people of this State, being by the providence of God free and independent, have the sole and exclusive right of governing themselves as a free, sovereign, and independent State; . . . That this republic is and shall forever be and remain a free, sovereign, and independent State." (Con-

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necticut act of 1776, establishing the charter as a constitution, Preamble and Article 1.) "The people of this commonwealth have the sole and exclusive right of governing themselves as a free, sovereign, and independent State." (Massachusetts constitution of 1780, still in force, Art. 4.) "This convention, therefore, in the name and by the authority of the good people of this State, doth ordain, determine, and declare that no authority shall, on any pretence whatever, be exercised over the people or members of this State but such as shall be derived from and granted by them." (New York constitution of 1777, Art. 1.) "That the style of this country [*sic*] be hereafter the State of South Carolina." (South Carolina constitution of 1778, Art. 1.)

When we add to such expressions as these the emphatic *caveat* of the second of the Articles of Confederation, "each State retains its sovereignty, freedom, and independence," the whole makes up a formidable mass of contemporary testimony in favor of the "sovereignty" of the individual States; and it is re-enforced by the unconscious and ingenuous testimony given by the almost invariable language of men of the time in official and unofficial positions. And, finally, in the treaty of peace which closed the war, the high contracting parties joined in declaring, not that the United States as a nation was independent, but that the several States, naming them in order, were "free, sovereign, and independent States."

But, after all, what is all this argument from authority worth more than the impotent protests of a drowning man in the midst of a resistless current? His declarations that he will not drown can hardly save him without the added exertion of swimming. If "sovereignty" could be maintained by resolutions alone, the argument from authority would be of weight; but neither is true. Reams of resolutions would be of little avail in maintaining the "sovereignty" of Ireland or Poland, unless the resolvers

were ready to back their resolutions by physical force; and no such readiness was ever shown by the individual States. Massachusetts came nearest to it in the sudden levy of troops and siege of Boston which followed the fight at Lexington; but even Massachusetts, while fighting the enemy with one hand, was with the other beckoning to the nation for help, and her delegates, as soon as the Continental Congress met in the following month, successfully urged the adoption of her troops as a "continental army." In resolutions the States were prolific: when it came to war, the highest and most dread attribute of "sovereignty," all instinctively shrank back, and pitted the true nation against a king, sovereign against sovereign.

The mass of evidence above summarized goes just far enough to prove that the individual States were sovereignties *in posse*; and had any one of them ever ventured on the next essential step, and maintained its separate sovereignty by physical force, no sane man could have denied that it was at last a sovereignty *in esse*. But this last step has always been wanting, and, while that is the case, all is wanting. That States, thus cowering like frightened chickens under their mother's wing, should have gone on calmly ignoring in words their mother's existence, and asserting by resolution the sovereignty which they dared not maintain by force, only shows the inability of even the wisest men to see clearly all the phases of contemporary history. That able men should still argue that a sovereignty *in posse* can be transformed into a sovereignty *in esse* by such a cheap and easy weapon as a resolution, only proves that prejudice is still frequently of stronger weight than obvious fact. That the nation should have quietly tolerated such open denials of its very existence, only proves the national indisposition to apply unnecessary force. An emperor or a czar must suppress the least impeachment of his sovereignty: the American Republic will still calmly allow even

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an open denial of its existence—always provided that the denial is confined to theory.

But it must not be supposed that the argument from authority itself is so overwhelmingly in favor of State sovereignty as the summary above would imply. We may pass by the unofficial exhibitions of national spirit in Revolutionary times, and still have a reserve force of authority to show the universal consciousness that the controlling, though always self-controlled, power was in the *national* people. Congress, in its declaration of July 6, 1775, says: "We exhibit to mankind the remarkable example of a people [not of thirteen peoples] attacked by unprovoked enemies." The same body formulates its proclamation of December 6, 1775, thus: "We, therefore, in the name of the people of these United Colonies"; and thus begins its Declaration of July 4, 1776: "When, in the course of human events, it becomes necessary *for one people* to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal *station* to which the laws of nature and of nature's God entitle them." This last step, this assumption of a separate and equal station among the powers of the earth, is the only means by which "sovereignty" can properly be asserted; and it never has been so asserted by a single State. The real national revolutionary nature of the Declaration, and the subordinate part played by the States in it, are well stated in the address of Congress to the people, December 10, 1776: "It is well known to you that, at the universal desire of the people, and with the hearty approbation of every province, the Congress declared the United States free and independent." If we are to trust to authority, we may cite the sweeping assertion of Charles Cotesworth Pinckney, January 18, 1788: "The separate independence and individual sovereignty of the several States were never thought of by the



enlightened band of patriots who framed the Declaration of Independence; the several States are not even mentioned by name in any part of it." And no man in the South Carolina Legislature at that time said him nay when he denounced the claim "that each State is separately and individually independent, as a species of political heresy."

Again, in its commission to its ambassadors to France, October 23, 1776, Congress remarks: "A trade upon equal terms, between the subjects of his most Christian Majesty and the people of these States will be beneficial to *both nations*"; and the ultimate treaty of February 6, 1778, refers regularly to "the *two parties*" or "the *two nations*." The treaties with the Netherlands, Sweden, and Prussia, in 1783-5, use the same phrases. Nor did Congress hesitate to bring the national *power* into plain view, when necessary. December 4, 1775, it resolved that "in the present situation of affairs, it will be very dangerous to the liberties and welfare of America, if any Colony should separately petition the King or either House of Parliament." December 29, 1775, it resolved that "the Colonies of Virginia, Maryland, and North Carolina be *permitted* to export produce to any part of the world, except Great Britain," etc. Finally, May 15, 1776, the Congress recommended the various assemblies and conventions of the Colonies "to adopt such government as shall in the opinion of the representatives of the people best conduce to the happiness and safety of their constituents in particular and America in general"; and the national power which thus brooded over the State governments themselves is indicated in an address of Congress to the people of the United States, May 8, 1778: "Your interests will be fostered and nourished by governments *that derive their power from your grant*."

Even the State constitutions which declare the sovereignty of the State show the underlying consciousness of the delegates that a national power was in existence,

though it was more prone to show itself by acts than by words. The constitutions of Delaware, Georgia, New Hampshire, New Jersey, New York, North Carolina, and Pennsylvania all refer expressly to the previous action of Congress, and particularly to its resolution of May 15, 1776, as the justification of their action; and the four State constitutions (of Massachusetts, Maryland, Virginia, and South Carolina) which do not expressly refer to it, do so tacitly by their long delay until Congress took the initiative. The preamble of the South Carolina constitution of 1778 even assigns, as a reason for a new constitution, that "the United Colonies of America have since been constituted independent States . . . by the declaration of the honorable the Continental Congress, dated the 4th day of July, 1776." But the first constitution of South Carolina, March 26, 1776, strikes the deadliest of all possible blows at the theory of State sovereignty, whose essential dogma is that the United States exists in a State only by the continuing will of the State. On the contrary, article twenty-eight of this constitution declares that "the resolutions of the Continental Congress, *now of force in this Colony*, shall so continue until altered or revoked *by them* [Congress]." The resolutions of the National Congress in force in South Carolina, prior to any declaration of the "sovereign" will of South Carolina! Certainly Calhoun had no hand in framing this constitution.

Having stated the arguments, *pro* and *contra*, we can only conclude that the arguments from authority are quite evenly balanced, but that the argument from fact is overwhelmingly against "State sovereignty." The States declared themselves sovereign over and over again; but calling themselves sovereign did not make them so. It is necessary that a State should be sovereign, not that it should call itself so, while still sheltering itself under a real national authority. The nation was made by events

and by the acts of the national people, not by empty words or by the will of sovereign States; but the sovereign will of the nation has always been that there should be States, that the people should act politically through them, and that their rights and privileges should be respected.

2. If the argument from fact, that the separate States were never more than sovereignties *in posse*, and that they never ventured to become sovereignties *in esse*, is sound, it, of course, disposes of State sovereignty not only in the birth of the nation and in the formation of the Confederation, but in the adoption of the Constitution also. If a sovereignty was created by general and national obedience to the resolutions of a revolutionary national assembly, unlimited by any organic law; and if that sovereignty was maintained by a successful national war, there is no argument to the contrary in the fact that the new sovereignty allowed its agents, the State governments, to shape the Articles of Confederation, and to appoint delegates to the convention of 1787. The national sovereignty thus created *might* have disintegrated and died; New York or Virginia *might* have broken away and sustained herself as a sovereignty *in esse* as well as *in posse*; but there was in fact no such result.

The national feeling held the nation together, and forced the unwilling State governments to stand sponsors to a new national assembly. Such a body was the convention of 1787. It could not have been an assemblage of ambassadors from sovereign States, for, as is noted hereafter, no State constitution ever purported to give its legislature power to send such ambassadors or make such a treaty, and no governor ever ventured to assume such a power. And the convention, when it met, proved its national character by disregarding altogether the Articles of Confederation, which were never to have been even amended, except by unanimous vote of *all* the legisla-

tures; and by giving the ratification of the new form of government to State conventions, not even allowing the legislatures a voice in the matter.

Nevertheless, State sovereignty adduces a great mass of argument from authority in all the transactions which led to the adoption of the Constitution, and in the Constitution itself. The convention itself struck out the word "national" from the first resolution proposed to it, "that a national government ought to be established." Its debates are marked by frequent use of expressions relating to the sovereignty of the States. "That the States are at present equally sovereign and independent has been asserted from every quarter of this House," said one delegate. The expression, "We, the people of the United States," in the preamble to the Constitution, and the omission of the names of the States, are usually cited as decisive proofs against State sovereignty. Undoubtedly the people of the nation were making the Constitution, but it is very doubtful whether many of the delegates were aware of the fact: most of them probably still applied the word to the people of their own individual State, and felt, as the *Federalist* (No. 39) expressed it, that "each State in ratifying the Constitution is considered as a sovereign body, independent of all others, and only to be bound by its own voluntary act."

The omission of the names of the States seemed decisive to so respectable an authority as Mr. Motley, but unluckily the omission cuts the other way. In the first draft of the Constitution, as reported by the committee, August 6, 1787, the preamble reads, "We, the people of the States of New Hampshire, Massachusetts," etc. (naming them in order), and the names were left out in the final draft from the apprehension that one or more of the States named might, by virtue of its supposed "sovereignty," reject the Constitution, drop out of the Union, and compel an after alteration of the preamble.

To the same effect is the seventh article of the Constitution, as finally adopted: "The ratification of the conventions of nine States shall be sufficient for the establishment of this Constitution *between the States so ratifying the same.*"

What, then, was to be the status of the States which should refuse to ratify? Were they still in the Union, perhaps as Territories? Or were they to secede from the Union? Or had the other States already seceded, and left them to keep warm the ashes of the old Confederation, if they could? Was the Constitution itself a successful secession from the Confederation? or did it only provide for necessary secession in this seventh article? Such questions as these have always had an obvious fascination for the advocates of State sovereignty, while their opponents have usually avoided both Scylla and Charybdis by going overland and ignoring them altogether. But, in any candid discussion of the subject, they must be met and answered; and, in order to answer them, the effort has been made to state them fairly and strongly.

Such questions, with their tacit implication that "sovereignty" is a mere affair of words, that any body of men, in order to be sovereign, has only to call itself, or be called, sovereign, afford silent but weighty testimony to the peculiar natural advantages which the American people enjoy, and have always enjoyed. If the proximity of more powerful neighbors had ever compelled the American people to sacrifice one or more States or parts of States as the price of a treaty of peace, the fallacy of State sovereignty would have been exposed. But this has never been necessary, except in the partial example of Maine in 1842; and annexation, which is the complement of such territorial sacrifice, is always ignored by the advocates of the doctrine.

Free from dangerous neighbors, the American people

did not, until 1861, learn the truth which bitter experience had made familiar to less favored quarters of the globe, that sovereignty is always potentially an affair of "blood and iron"; and that it needs not only men who know, or think they know, their rights, but men who, "knowing, dare maintain." Sovereignty is indivisible, as any controlling will is indivisible. As between the nation and the States, the only question must be, Which was the sovereignty? And it can only be answered by asking, Which dared to go alone, to carve out its own path, and achieve its own destiny? The question answers itself. Two States, Rhode Island and North Carolina, refused to ratify, and the Constitution went into force without them. There could have been no more excellent opportunity than this to convert a sovereignty *in posse* into a sovereignty *in esse*; but this first and last test for sovereignty compelled each of these States to answer, "It is not in me." Within two years both were confessedly in their natural places as part of the nation: both had ratified the Constitution, nominally as their voluntary act and deed, but actually, like other States, under stress of circumstances. We cannot know how far Rhode Island was influenced by unofficial propositions to carve up her territory between Massachusetts and Connecticut, or how far North Carolina was influenced by official propositions in Congress to suppress or restrain her commerce with the neighboring States.<sup>1</sup> We can only see the patent fact that these two States had and shrank from the opportunity to attempt to become sovereign in very truth.

But the constitutional phrase, "between the States so ratifying the same," brings up the further question, Where were Rhode Island and North Carolina between March 4, 1789, and their respective ratifications in 1789-90? Were they in or out of the Union? Unless the

<sup>1</sup> See Secession.

nation existed, and these States were still a part of it, we are completely at sea. The nation which had by successful war extorted from Great Britain a recognition of its boundaries would not have been slow upon occasion to compel Rhode Island and North Carolina, and Vermont as well, to respect those boundaries, and to recognize themselves as included within them. But no such occasion arose, and no argument can fairly be drawn from a *forbearance* of the nation to enforce its sovereign will. Failure to overcome an open defiance would have been a different matter; but a father's authority is not to be fairly impeached from his forbearance in allowing a recalcitrant son an hour for consideration. In point of fact, Rhode Island and North Carolina finally ratified the very Constitution which they had at first rejected, without a single amendment to commend the chalice to their lips. There was no escape for them: they had to ratify; but the forbearance of the nation gave them an opportunity to do so "voluntarily."

That the new scheme of government should have been defeated by the will of two States, or that these two should remove themselves without successful war from the boundaries fixed in 1783, would have been equally impossible; but the nation had been guilty of an oversight in allowing State legislatures to form the Articles of Confederation, with their absurd provision for a unanimous ratification of amendments, and the nation scrupulously atoned for its oversight by forbearing to press even the weakest of its States. There is of course a still stronger argument drawn from the nature of the Constitution, but that will best be considered under the second part of this chapter.

It would be unfair to deny that the various conventions which ratified the Constitution in 1787-90 considered themselves as acting for "sovereign States." The debates of the Virginia convention show that the

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word "people" meant the people of the several and individual States, and not of the nation, in this declaration, which was a part of the ratification: "That the powers granted under this Constitution, being derived from the people of the United States, may be resumed by them, whensoever the same shall be perverted to their injury or oppression"; and these words, in their literal meaning, have the essence of the doctrines both of State sovereignty and secession. But these words, again, are mere "authority," void as against facts.

Whose was the uncontrollable will, the sovereignty, that extorted ratification from an unwilling majority in Virginia, New York, New Hampshire, and Massachusetts, and, later, in Rhode Island and North Carolina? Was it the will of any State? or was it the will of the nation, acting, according to its own preference, through State organizations? The question answers itself, provided the questioner will confine himself to the facts of our history, and turn a deaf ear to the conflicting arguments from authority, the opinions, sometimes correct and sometimes incorrect, of the actors in the history. But the question is often triumphantly asked, What would have happened if a part of the States had refused finally to ratify? Either the recusants would have left the constitutional number of ratifying States (9), or less than that number. In the latter case the condition placed upon ratification by the national will would not have been fulfilled; and the whole scheme of the Constitution would have failed. In the former case, the pressure upon the recalcitrant States would have been gradually increased until the alternative of ratification or force would have been distinctly presented. In either event, that of general confusion or that of the forcible maintenance of the national will, the sword, the *ultima ratio* of sovereignty, would have made its appearance; and, whatever the result of the struggle might have been, "State sovereignty"



would certainly have received before 1800 the quietus which it finally received in 1865. One sovereignty, or two, or three, might have emerged from the chaos, but State sovereignty, and even State rights, would hardly have survived.

In this point of view the ratification debates of 1787-9 show the usual contradiction between authority and fact, between the constant assertion of State sovereignty and the ever-present fear that force might dispel the illusions of the assertion. A contemporary tradition is, that Washington, while signing the Constitution, thus struck the keynote of this feeling: "Should the States reject this excellent Constitution, the probability is that an opportunity will never again offer to cancel [substitute] another in peace: the next will be drawn in blood." "I fear a civil war," said Gerry. "Apprehending the danger of a general confusion and an ultimate decision by the sword, I shall give the plan my support," said Charles Pinckney. "Is it possible to deliberate between anarchy and convulsion on the one side, and the chance of good to be expected from the plan on the other?" asked Hamilton. "Suppose," said Thompson, in the Massachusetts convention, "nine States adopt this Constitution: who shall touch the other four? Some cry out, Force them. I say, Draw them." In the Virginia convention Patrick Henry unconsciously drew a pregnant parallel between the forbearance of the nation in forming the Confederation and in forming the Constitution: "During the war America was magnanimous. What was the language of the little State of Maryland? 'I will have time to consider. I will hold out three years. Let what may come, I will have time to reflect.' Magnanimity appeared everywhere. What was the upshot? *America triumphed.*" Where was the sovereignty, then, the uncontrollable, though self-controlled and "magnanimous," power in the cases of Maryland under the

Confederation, and of Rhode Island and North Carolina under the Constitution? Finally, December 14, 1787, in a public letter, Washington used the following language, which sums up the case against State "sovereignty" in framing the Constitution: "Should one State, however important it may conceive itself to be, or a minority of the States, suppose that they can dictate a constitution to the majority, unless they have the power of administering the *ultima ratio*, they will find themselves deceived."

As a summary, we may say that the ratification of the Constitution by the conventions of six of the States, New Hampshire, Massachusetts, Rhode Island, New York, Virginia, and North Carolina, was not at all voluntary; that it was extorted by the evident preponderance of the national will, including minorities in their own States, as well as majorities in other States, and by a fear of arraying a *pseudo* sovereignty against a real sovereignty; that the whole process was a national act; and that the strongest arguments from authority cannot avail against the facts of the case. Nevertheless, there is one expression of opinion which should be cited here, not as an argument from authority, but as giving exactly and tersely the writer's belief. It is that of James Wilson, in the Pennsylvania convention of December 4, 1787. "My position is, that in this country the supreme, absolute, and uncontrollable power resides in the people at large; that they have vested certain proportions of this power in the State governments; but that the fee-simple continues, resides, and remains with the body of the people." He who asserts the contrary, who holds that the will of a State is, or has ever been, uncontrollable, must prove it by adducing facts, not opinions, whether contemporary or subsequent to the Revolution.

3. After 1789 State sovereignty entered upon the seventy-five years' struggle with the national idea which

ended in 1865.<sup>1</sup> Throughout this struggle almost every State in the Union in turn declared its own "sovereignty," and denounced as almost treasonable similar declarations in other cases by other States. Where these declarations stopped, and were intended to stop, at naked assertion, they come properly under our third head of "State rights." In this form they have always been common, and probably will again be common, though they have much decreased in frequency since 1865. So late as March 19, 1859, on the occasion of a Supreme Court decision against the Wisconsin "personal liberty law,"<sup>2</sup> the State Legislature passed a series of resolutions, the last of which spoke the following strong language: "that the several States which formed that instrument [the Constitution], being sovereign and independent, have the unquestionable right to judge of its infractions; and that a *positive defiance* by those sovereignties of all unauthorized acts done under color of that instrument is the rightful remedy." References to sovereign States and the sovereignty of the States have since been by no means unusual in legislative resolutions and judicial decisions. A good example is in the message of Governor Robinson, of New York, June 14, 1878, vetoing a bill to enable creditors of other States to sue through New York State officers: "It requires the State to lay down its dignity, its honor, and its integrity as a sovereign State of the Union, and to become a collecting agent for speculators in State bonds." In none of them has there been any apparent notion of a possible maintenance of the so-called sovereignty by force in case of opposition to it.

We are interested only in the cases where this final test of sovereignty has been brought in question. • It is fairly

<sup>1</sup> See Kentucky Resolutions; Convention, Hartford; Nullification; Secession; Reconstruction.

<sup>2</sup> See that title.

doubtful whether the New England opposition to the embargo and the War of 1812 falls in the former or in the latter class. The probability is that it really meant State sovereignty to a few of the leaders, but only State rights to the mass of the leaders and followers. The action of Pennsylvania in the *Olmstead* case, in 1809, and of Georgia in the *Cherokee* case, in 1830–32, inclined toward the forcible maintenance of the State's will. In the former case the national authority was enforced, and in the latter it was yielded. South Carolina's nullification of the tariff act in 1832 fulfilled every requisite of the theory of State sovereignty by employing a formal State convention to declare the uncontrollable will of the State.

This was therefore the first fair and open attempt in our history to maintain the doctrine to its logical consequences, and it was a failure. The inability of the State to maintain its ground was so evident that an unofficial assemblage suspended the sovereign will of the State to a point beyond the designated time. From this time State sovereignty became inextricably blended with slavery, until the growing union of both ended in secession in 1860–61.<sup>1</sup> It is very true, as most Southern writers assert, that the fundamental issue on which the seceding States waged war in 1861–5 was the maintenance of "the right of self-government," that is, of State sovereignty; and that in comparison with this, slavery was of little importance. It is true that, when a State had once pronounced its will to secede, both the supporters and the opposers of secession felt bound to maintain the will of the State, even to the extent of war against the United States. But it is equally true that no such issue would ever have been presented but for slavery and its progressive influence in arraying the will of the State against the will of the nation. When the issue was at last presented,

<sup>1</sup> See *Slavery, Secession*.

it could no longer be avoided. There was no room for forbearance, or, as Patrick Henry termed it, "magnanimity"; sovereignty was brought to the touchstone, and State sovereignty was found wanting.

In the subsequent process of reconstruction,<sup>1</sup> there was very much that was at variance not only with State sovereignty, but with State rights as well. The power over the militia, the elective franchise, the State courts, and the police regulation of cities and towns, which the universal national will decrees to be in the States, was for a time withheld from the lately seceding States. If this was intended in any way as a certificate of burial for the defunct theory of State sovereignty, it served the further purpose of bringing into plainer view the healthy doctrine of State rights; for the punishment was so abhorrent to the national instincts that it was very rapidly abandoned. Out of all the struggles of the past has come the unanimous will of the nation, equally opposed to State sovereignty and to centralization, that it shall be an indissoluble Union of indestructible States.

II. Under the first head the effort has been made to show the baselessness of State sovereignty from the single historical fact that the will of the nation has always been the controlling power, though it has always been forbearing in non-essentials. It is necessary further to adduce some other more isolated facts, all showing that the States were never sovereigns.

I. It is essential that a sovereignty should have complete power of independent action in external affairs as well as in internal affairs. Foreign nations, in their intercourse with a state, look, not to assertions of sovereignty, but to the fact, and regulate their recognition and diplomatic relations accordingly. What are we to think of a "sovereignty" that never declared or waged a war, never concluded a peace, never sent or received an ambassador,

<sup>1</sup> See that title.

never flew a recognized flag, and never formed a treaty or an alliance? And yet this is the history of nearly if not quite all the States. The few exceptions, the New England Union,<sup>1</sup> the Indian wars and treaties of New England and the South, the pine tree flag and coinage, were *sub rosa* appropriations of the insignia of sovereignty, unrecognized by any others than the appropriators, and most of them occurred in colonial times, when sovereignty, other than the King's, was unthought of. Even when the Colonies became States, the usual American political sense showed itself through all the declarations of State sovereignty: none of their State constitutions purported to give the State governments any of the powers above enumerated, nor was this withholding of power the consequence of any agreement in the Articles of Confederation, for all the State constitutions were framed before, most of them five years before, the Articles of Confederation went into force. It was the consequence of the instinctive national sense that these belonged to the real sovereignty, the nation. There is a single remarkable exception, the twenty-sixth article of the South Carolina constitution of 1776: "That the president [governor] and commander-in-chief shall have no power to make war or peace, or enter into any final treaty, without the consent of the general assembly and legislative council." But even this (unaltered until 1790) must be taken as only an argument from authority, since the implied treaty power of the State was never maintained in fact.

2. The States have nowhere shown their lack of the essentials of sovereignty more conspicuously than in their self-confessed inability to stand alone. At the very outset of the struggle between the nation and the King, in 1775, the boldest of the States, Massachusetts, was the loudest in calling upon the Continental Congress for help

<sup>1</sup> See that title.

to maintain her integrity. The first State to form a constitution, New Hampshire, did so only after seeking the patronage of Congress, and all the other States, except South Carolina, waited, before taking the same step, for the general recommendation of Congress, May 15, 1776, referred to above. In the Articles of Confederation each State legislature undertook to covenant with all the others for protection. This was found to be too weak a safeguard, and the nakedness of State sovereignty was fully exposed in the adoption of the Constitution: "The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion and . . . against domestic violence." Even in 1861 the seceding States, which so loudly declared their sovereignty, were at the same time contradicting the assertion by their instinctive efforts to form a new nation for the protection of State sovereignty. A sovereignty incapable of self-maintenance, and always under the protection of a higher power, is a contradiction in terms.

3. A still stronger objection is the nature of the governments, whether they be called federal or national, which have been formed in, for, and by the Union. The first, or revolutionary, government of the Continental Congress was absolutely opposed to State sovereignty. The armies which were mustered, the navies which were created, the war which was waged, the flag which was displayed, the treaties which were made, and the debt which was contracted, were all exclusively national, and depended for their credit on the will of the whole people. Congress even showed its national nature by declaring independence without the assent of New York, and by practically making Washington dictator in 1777. Even the Articles of Confederation, though they declared the sovereignty of each State, contradicted the assertion by leaving the insignia of sovereignty to the National Gov-

ernment. When we come to the Constitution, the objection becomes absolutely insuperable. The prohibitions upon the States in Section 10 of Article I. are all prohibitions of the exercise of sovereign powers; the States, then, were not in fact regarded as sovereignties, either by themselves or by others. The same argument cannot be applied to the preceding section, prohibiting the exercise of certain powers by the United States; for these are all matters of routine, not sovereign powers. Under the Constitution the States were not to have even the appearance of sovereignties: the powers to declare war, to make peace, to conclude treaties, to suppress insurrections, and to punish treason, were now placed where they belonged, in the National Government. If States formed the Constitution, they stultified their own assertions of sovereignty. The conclusion must be, not that States, State governments, or the Federal Government is sovereign, possessed of uncontrollable power, but that the people of the nation, divided by its own will into States, is sovereign.

The idea that the sovereignty of the States was only suspended by the formation of the Constitution, ready to be revived at any moment by the will of the State, though it was the general Southern doctrine after about 1803,<sup>1</sup> is altogether too fine spun for practical use or recognition. The idea of a comatose sovereignty, of a sovereignty which sleeps like Rip Van Winkle, but wakes at the exercise of its own suspended will, of an uncontrollable will which still exists, though it has resigned its essence to another, of an abdicated sovereign peaceably reviving its own sovereignty, is certainly an extraordinary political dogma; and its evident fallacy is enough to disprove the notion that the States were ever sovereign.

Above all, the provision for amendment by three fourths, not by all, of the States, is a flat negative to

<sup>1</sup> See Secession.



State sovereignty. There is, with the obsolete exception of the retention of the slave trade until 1808, and with the always controlling retention of State lines, no limit upon the power of amendment. Can we imagine real sovereignties not only "suspending" the exercise of their own wills on points certain, but agreeing to accept as their own the unlimited and indefinite future will of three fourths of their associates? And yet the only alternative for State sovereignty is to imagine the States as making the agreement without the intention of keeping it. This one provision for amendment is sufficient to outweigh all the arguments from authority that could be adduced.

4. It is usually assumed that State sovereignty is essential to a federal government, and is only denied because of the desire to introduce the idea of a national or centralized government. In fact, the government is both national and federal: not, as the *Federalist* asserts, partly national and partly federal, by the will of the States; but together national and federal, by the will of the whole people. Powerful enough to have established the most centralized government, if it had been foolish enough to desire it, the national will has always, of its own motion, limited itself to such a government as the States should agree upon, a federal government. When the nation's first instruments, the State legislatures, proved unfit, the nation was strong enough to wipe out their work and substitute a better; but it still pledged itself to maintain the States intact, and to make no change in the Constitution on which three fourths of the States could not agree.

This universal American predilection to a federal form of government has made it possible to argue in favor of the sovereignty of the original thirteen States, but the case is altogether different when we come to the States which have been subsequently admitted under the Constitution. So difficult is it to ascribe their existence to their own uncontrollable will, or to anything else that

the uncontrollable will of the nation, that the advocates of State sovereignty here find (and evade) *their* Scylla and Charybdis. Take the State of Missouri as an example. Its territory was sold by France to a sovereignty, the United States, not to any or all of the States. It was bought by the nation as a sovereignty, not by any permission given by the States in a written constitution. Its original acquisition, its erection into a Territory, its government as a Territory, were alike the results of the national will. And when its population had grown sufficiently to justify hope of stability, the national authority regulated the formation of a State government, established its boundaries, and finally, in its own time and on its own terms, admitted the new State to the Union. Will any man be bold enough to specify where and when the sovereignty, the uncontrollable will, of Missouri came into this long process as a factor? To whom, then, do the people of Missouri owe what would still often be called their "sovereignty," the absolute power over their own affairs, which they have enjoyed since 1820, but did not enjoy before 1820? Evidently, to the national will. There is not a State, old or new, in this Union, whose will has been considered in the establishment of its own boundaries. The boundaries of the original thirteen States and of Vermont were fixed by the royal power and its agents; the boundaries of new States, and the rearrangement of the boundaries of the old States, have been fixed under the supervision of the new national sovereignty; and neither of these classes of *pseudo* sovereignties has ever had the power to add one cubit to its area of its own uncontrollable will. Indeed, one of them (Iowa) was refused admission until she would accept the boundaries which the national will had fixed for her.

The only fair arguments to the contrary are Rhode Island and Texas.<sup>1</sup> But these were only apparent.

<sup>1</sup> See those titles.

The long resistance of the former to the encroachments of her neighbors was passive, not active; and the boundaries of the latter, which her own power had been unable to establish as she claimed, were finally fixed by the United States. Texas, indeed, is a good deal of an anomaly in her entrance to our system. An undoubted sovereignty previously, she was rather united to the Union than admitted to it. Some of the Whigs, who were opposed to the admission, even claimed at the time that it was a fair question whether the United States had annexed Texas, or Texas had annexed the United States; that the junction of the two republics had properly abolished the constitutions of both, and vacated the offices of their respective presidents; and that a new constitution and a new president were necessary for the new nation. But the overwhelming superiority of one of the two parties was taken as a sufficient offset for all legal informalities, and the "annexation" was consummated. Barring this anomalous case, the origin of State sovereignty in new States is a field of inquiry which the advocates of the theory of State sovereignty cannot be induced to enter. The ablest and latest of them, in his *Republic of Republics*, cited below, has a chapter of eight pages on "Sovereignty in the New States," in which the whole question is evaded carefully and successfully. Its only attempt at argument is in the closing sentences of the chapter: "Can you think, dear reader, of any political difference between Ohio and Connecticut, Virginia and Missouri, New Jersey and Texas, Georgia and California, as to *status*, capacity, or rights?" And the answer must be: There is no difference; each and all owe their *status*, capacity, and rights to the power which won them, by force or purchase, from Great Britain, France, Spain, or Mexico, and which has since maintained them, the nation.

In fact, State sovereignty is the deadliest of all enemies

to a federal government. In a government without the federal principle, the entrance of the error is impossible, or extremely difficult. As soon as the federal principle enters, its parasite enters with it, and usually succeeds in destroying it. A permanent federal union, based upon the uncontrollable will of the States which composed it, would be as impossible as permanent connection between man and woman without lawful marriage. The sovereign power of the nation, by the certainty which it gives to the bond, places in the category of the impossible countless grievances which, without a national power, would soon be magnified by State jealousy and State demagogues into good reason for dissolution of the bond. He, then, who denies State sovereignty, but upholds State rights, does so not in defence of the national power, which is perfectly able to defend itself, but in defence of the most beautiful and yet delicate of all schemes of government, the federal system.

III. *State Rights*.—From 1800 until 1865 the phrase "State rights" looked directly or indirectly to but one of the supposed rights of a State, the right of secession. The political revolution of 1800 was caused very largely by the revolt of the mass of the people against the Federalist idea that the Federal Government was sovereign, a very different thing from the assertion that the nation is sovereign. The new party that then assumed control of the Federal Government did so on the theory that the Federal Government was the servant of the States, and that the Union was wholly voluntary on the part of the States. This theory was summed up in the name "State-Rights Democrat." In the North and West the theory had disappeared in reality long before 1860, and men in those sections who called themselves "State-Rights Democrats" were hard pressed to reconcile their party name and their support of the war against the Rebellion. In the South the name and theory were kept in complete

sympathy by the multifarious influences of slavery until State sovereignty and slavery went down in a common overthrow in 1865. "State rights" may now take its proper signification, that which belonged to it in reality even while "State sovereignty" was given as its formal name.

In reading the debates of the period from 1775 until 1789, no one can help noticing the peculiar way in which the word "sovereignty" is used. The same men who recognize at every step in fact the existence of a national sovereignty, continue to refer to the States as "sovereignties." The same Wilson, whose exact and satisfactory statement of the ultimate national sovereignty has been used above, speaks thus in another place: "The business of the federal convention . . . comprehended the views and establishments of thirteen independent sovereignties." And such apparent contradictions are not the exception, but the rule.

"The American statesman's dictionary," says von Holst, "was written in double columns, and the chief terms of his vocabulary were not infrequently inserted twice: in the right-hand column, in the sense which accorded with actual facts, and was in keeping with the tendency toward particularism ; in the left, in their logical sense, the sense which the logic of facts has gradually and through many a bitter struggle brought out into bold relief, and which it will finally stamp as their exclusive meaning."

If they endeavored to "outdo the mystery of the Trinity by making thirteen one, while leaving the one thirteen," it was because they were conscious that the thirteen were thirteen by the will, protection, and support of the one. It is by the citation of one member of each of these verbal contradictions that the advocates of State sovereignty have built up their argument from authority, making the

“fathers of the republic” the fathers of their theory, while ignoring the practical application by which the fathers aforesaid explained their apparent contradictions. The contradiction will disappear if we take in set terms what the fathers took in practice, that the States were not sovereign of their uncontrollable will, but that they possessed absolute power in their own sphere by the will of the nation. “State sovereignty” then takes its proper form of “State rights.” The nation may diminish or enlarge the sphere of the States: it has repeatedly done both by amendments; but, whatever the sphere of the States may be, they are supreme within it.

It may be said that this reduces the States to the rank of counties, but the objection will not hold. The will of a State, to which the nation has abandoned the control of cities, towns, and counties, is easily expressed and exercised: but the will of the nation can only be expressed and exercised with such enormous difficulty that the States are practically safe from it, unless an unusually great emergency calls it forth. What present hope is there for any suggested amendment to the Constitution? It may further be said that such a theory allows the possible establishment of a monarchy in the United States. Be it so: pray, who is to prevent it if the national will should incline to a step so foolish? He who assumes to prevent it must do so by force. Who could have prevented it in 1775 or in 1787-9, if the nation had willed it? The report was common in 1787 that a part of the convention’s plan was to call an English prince of the blood to the throne of the United States. Had the report been correct, and the step been ratified, the only difference in the result would have been that Rhode Island and North Carolina would have felt from a selfish royal personality a pressure very different from the magnanimous forbearance which a republican government could afford to exercise. But the sovereignty would have been

alike in both cases, and its exponent the same in kind, differing only in degree.

And how in reality does this assail the dignity of the States, since it plants their authority on a base so broad as to be practically immovable? Federal government and State governments are alike exponents of the national will, and the effort to secede on the one hand, and to unconstitutionally oppress a State on the other, are alike defiances of the national will, though, if successful, the latter may be atoned for, while the former cannot. It is notorious matter of fact that, in a peaceable and legal struggle between the Federal Government and a State government, the national sympathy is rather with the latter than with the former; and the State government, supported by the consciousness of this general sympathy, and aided by its own greater intensity of interest, has a much greater probability of success. If the struggle verges toward a settlement by force, national sympathy for the State government decreases, until the distinctive federal authority is formally or actually acknowledged; and then the controlling national feeling shows itself by marking as a victim for political punishment any department or officer of the Federal Government that has been instrumental in thrusting upon a State the alternative of force or submission. The national will approved the Federalist measures of 1798, the action of President Adams against Georgia in 1824, the nullification proclamation drawn up by Edward Livingston against South Carolina in 1832, and the forcible suppression of ku-klux disorders by the Grant Administration in 1871-3; and in all these cases the national sympathy almost instantly showed itself against the authors of the acts which had been approved. Even in ordinary politics, there is no greater danger to an American administration than the well- or ill-founded belief that it is endeavoring to coerce the will of its own party in a State. "[American] men,"

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said Hamilton, bitterly, "are rather reasoning than reasonable animals"; and the national devotion to a federal system must be fully taken into account by any one who would attempt to study American political history.

And we cannot doubt that the national feeling is justified by reason, by the events of the past, and by the probabilities of the future. It is so obviously impossible for any mere centralized government to consult wisely and well the diverse interests of California, Maine, and Florida, as far apart in distance and climate as London, Teheran, and Morocco, that the absolute necessity of the federal system is everywhere recognized without question. The people of each State feel that the principle on which their own happiness and comfort rest would be destroyed if they should connive at an encroachment by the Federal Government upon the sphere of another State. They know instinctively that in so vast a country the choice is between the federal system and disunion, for the most solidly based centralized government could not hold the nation together six months; and in the train of disunion come diplomatic relations, international wars, standing armies, and the subordination of the many to the few. Rather than admit the first appearance of such evils, they have denied to the States the power to recall their Senators; rather than suffer the reality, they have surrendered the dearest prejudices of their nature, and conquered and reconstructed a portion of the States of the Union. They perceive that a federal system, so far from being in any need of State sovereignty, is injured by the first appearance of State sovereignty and the diplomatic relations implied in it; but that any abandonment or infringement of State rights is an insult and an injury to the nation, and a subtle attack upon the federal system, in which alone the nation can maintain its unity.

And the lessons which the past has taught are of such a nature that the future can only add force to them.



State sovereignty, with its shifting possibilities of rearrangements of federal associations, disunions, and reunions, might have been possible in a limited area, with small population, slight internal interests, and no foreign intercourse; but it was impossible even in 1775, and every doubling of population and wealth since has only made the impossibility more patent. And in exactly the reverse order, the maintenance of State rights, comparatively unimportant in 1775, has grown every year more essential to the well-being of the people, whether viewed as States or as a nation. The area of the State of New York is closely similar to that of England, and there seems to be no great reason why New York should not expect to rival England in population and in wealth. At any rate, every advance toward that point is a stronger reason not only why the welfare and happiness of the increasing population of New York should be consulted, but also why the rest of the country, with its increasing stake in the welfare of New York, should consult it by maintaining the State rights of New York.

In this essential respect, there seems at present to be little fear for the future. It is, of course, not so easy for one who is in the current of events, as for one who looks from the outside, to calculate exactly their force and direction; but so far as can be seen now, the intensity of the national predilection for State rights is increasing, not diminishing. Mr. E. A. Freeman, in his magazine article, cited below, lays stress on the general American substitution of the word "national," since 1860, for the word "federal." "It used to be 'Federal capital,' 'Federal army,' 'Federal revenue,' etc.; now, the word 'national' is almost always used instead. This surely marks a tendency to forget the federal character of the National Government, or at least to forget that its federal character is its very essence." The argument would be very strong if the change had taken place in a period of

peace; but the change really shows no sign of permanence, and is only one of the last waves of the tremendous exertion of national sovereignty in 1861-5, never, it is to be hoped, to be again made necessary. A stronger argument is drawn from the passage of laws by Congress, such as the National Banking Law, the General Election Law, and a few other statutes, which conflict with what were long considered State rights. But these are exceptional cases, due to causes entirely outside of State rights.

It is far more noteworthy that State rights, even of the conquered States, have come unscathed through the storm of a desolating war directed against a number of the States. It would be difficult to specify any point in which the theory of government by States has been seriously marred since the adoption of the Constitution. Wherein do the people of New York or Virginia govern themselves less now than in 1789? The only fear to the contrary is in the encroachments of the Federal judiciary; but these would punish and correct themselves by so clogging the Federal courts with business as to compel their reformation by the national will. And while the outlines have been maintained, the State's power has grown *pari passu* with that of the nation: New York is now a stronger and richer State, a more powerful government, a more valuable friend in peace, a more formidable enemy in war, than the whole United States in 1789. Under the silent but potentially omnipotent sovereignty of the nation, New York has always enjoyed a power of self-government which her own sovereignty could not have made more absolute, and might easily have made much more doubtful. Under the shadow of the powerful commonwealths of Massachusetts and Pennsylvania, the little States of Rhode Island and Delaware are living their own peculiar life, under the national *ægis*, with an absolute fearlessness of interference from their neighbors for which many a stronger State elsewhere might well

have bartered the Philistine armor of "sovereignty." The very same cause, the steady growth of the States in population, wealth, and material interests, which would have made State sovereignty yearly more dangerous and hateful to the nation, makes State rights dearer and more evidently essential.

And it does not require a very close scrutiny of passing events to see that the same cause which has just been mentioned is actually developing a deeper shade of particularism than even State rights. As the State grows more populous and wealthy, a growing diversity of interests in different parts of the State develops a particularist feeling within the State itself. The germ of the feeling has always existed in some of the States. Western and eastern Massachusetts, New York, Pennsylvania, Virginia, and North Carolina have quite regularly taken opposite political directions, and in one of them (Virginia) the fissure, expanding under the force of open war, has resulted in the formation of a new State. But in all the larger States there are indications of the steady growth of the feeling; and the probability is, that, as soon as population becomes dense, the pressure of conflicting interests will be relieved by the throwing off of new States. Already New York has three fairly defined sections, the west, the north, and the southeast, any one of which is a potential State. The enormous and diversified area of Texas was never made for a single State; and only increasing density of population is needed to make the same thing evident in other cases. The silent growth of the feeling may be estimated from a single instance.

In 1794 the so-called "Whiskey Insurrection,"<sup>1</sup> in western Pennsylvania, was suppressed by militia, a part of the force being drawn from New Jersey, Maryland, and Virginia. In 1877 the same region was the scene of a part of the railroad riots, and the attempt was made

<sup>1</sup> See that title.

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to employ militia from the eastern part of the State in restoring order. Let him who remembers the delirium of passion with which men of all classes resisted the attempt, ask himself what the result would have been if New Jersey, Maryland, or Virginia militia had again been introduced, and say whether the particularist feeling is less strong in that region now than in 1794. It is even evident that the particularist feeling is not confined entirely to sections of States, but that the great cities which have been growing up on our soil are also developing a particularism of their own.

The shibboleth of "home rule," the abandonment of State and national parties in local elections, which has of late years developed so strong a following in Philadelphia, Brooklyn, and New York City, is only a phrasing of this new and deeper shade of particularism, which will come out to full view as soon and as fast as it is needed. Mr. Freeman, in the article before referred to, notes this very peculiarity: "An American city is more thoroughly a commonwealth, it has more of the feelings of a commonwealth, than an English city has." Such evident tendencies may well offset a temporary exaggeration of the word national. They seem to show that the people of the United States are justified in their abounding confidence that their political machine has the power to correct its own errors and to guard against its own dangers.

A complete definition of State rights is an impossibility. Theoretically, they consist of all the powers of government which the nation has not transferred to the Federal Government or forbidden the States to exercise. By leaving the States and their governments *in situ* at the outbreak of the Revolution, the nation confirmed to them a power over their own territory practically unlimited at the time; but the rights and powers which they have since lost have gone to the General Government by direct transfer. The rights of the Federal Government

and of a State government must be ascertained by two directly opposite questions: in the case of the former we must ask what rights have been directly transferred to it by the Federal Constitution; but in the case of the latter, what rights and powers have been forbidden to it by the State or Federal constitutions. In the case of doubtful powers the presumption is against the Federal Government and in favor of the State, for the nation has given the Federal Government a limited charter, while it has only circumscribed the State government in certain particulars. The *onus probandi* is upon the asserter of Federal authority and the denier of State authority. The State's direct and indirect powers cover all the field of daily life and interests, while multitudes of persons live and die without once coming directly in contact with Federal power or practically realizing the existence of the Federal Government except by participation in biennial elections. But even this does not quite express the sum-total of State rights. The States still assert a power to punish for treason, though the power in offences against the United States has been transferred to Congress; and there are certain powers, such as the passage of insolvency laws, and the regulation of congressional elections, which they exercise in default of action by Congress. And, in general, they have whatever powers their courts may define as their right, and may succeed, by persistence or ingenuity, in maintaining against the Federal courts, always provided that the controversy does not take the aspect of force: in that case the State must yield to the more direct representatives of the national will. Even in this latter case, the chances are still decidedly in favor of the State; for it has, unless it is very evidently in the wrong, the pronounced sympathy of the nation, which works in its favor in innumerable ways. Conflicts of this kind are not uncommon: one is in progress at the present writing (1883) between the Federal and State courts in

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New Jersey. They are always compromised or evaded, and results will show that the State court, by claiming more than its right, regularly obtains all it can fairly ask.

On Confederate States see Jefferson Davis's *Rise and Fall of the Confederate States*; A. H. Stephens's *War Between the States*; Pollard's *Life of Davis, First Year of the War*, and *Lost Cause*; Draper's *Civil War*; Greeley's *American Conflict*; Victor's *History of the Rebellion*; Moore's *Rebellion Record*; Appleton's *Annual Cyclopædia* (1861-5); von Borcke's *Memoirs of the Confederate War for Independence*; Hitchcock's *Chronological Record of the American Civil War*; Centz's *Davis and Lee*; Lunt's *Origin of the Late War*; Bartlett's *Bibliography of the Rebellion*, and other authorities under *Rebellion*; McPherson's *History of the Rebellion*; Foote's *War of the Rebellion*; Dabney's *Defence of Virginia*; Gilmer's *Southern Politics*.

On State Sovereignty see, in general, Constitution, Art. I., §§ 4, 8-10; Art. III., §§ 2, 3; Art. IV., §§ 3, 4; Art. V.; Art. VII.; and Amendments, Arts. X.-XV. The theory of State sovereignty is best stated in 1 Tucker's *Blackstone*, Appendix, note D, and in Story's *Commentaries*, §§ 310-318. For the arguments in favor of it see, Centz's *Republic of Republics*; 1 Calhoun's *Works*; 2 *ib.*, 197, 262; 3 *ib.*, 140; 1 Stephens's *War Between the States* (see index); Fowler's *Sectional Controversy*, 351; Harris's *Political Conflict in America*, 212; Pollard's *Lost Cause*, 33. For the Madison theory, see *Federalist* (No. 39); *North American Review*, October, 1830, 537; 2 Curtis's *History of the Constitution*, 377. See also 1 Austin's *Province of Jurisprudence*, 226; 1 von Holst's *United States* (Lalor's trans.), 1-63; 5 Bancroft's *United States*, 500; 6 *ib.*, 351; Greene's *Historical View of the Revolution*, 119; Prince's *Confederation vs. Constitution*; 2 Rives's *Life of Madison*, 371; Hurd's *Law of*

*Freedom and Bondage*, cap. xi. ; 3 Webster's *Works*, 448 ; 1 Benton's *Thirty Years' View*, 360 ; Brownson's *American Republic*, 195, 239 ; Mulford's *The Nation*, 310 ; Goodwin's *Natural History of Secession* ; H. Adams's *Life of Randolph* ; Poore's *Federal and State Constitutions ; Journals of Congress* (under dates named) ; 1-3 Elliot's *Debates* (under dates and States named) ; Dillon's *Notes on Historical Evidence* ; 2 *Whig Review*, 455 ; Freeman's *Impressions of America* ; *Harper's Magazine*, June, 1880 (G. T. Curtis's article) ; 1 Bancroft's *History of the Constitution*, 146 ; 2 *ib.*, 47, 332 ; Hurd's *Theory of Our National Existence*, 104, 526 ; Willoughby's *The Nature of the State* ; Woodburn's *The American Republic* ; Burgess's *Political Science and Constitutional Law*.

## CHAPTER XII

### THE REBELLION

**T**HE name Rebellion has been retained in this work for the struggle of 1861-5, in preference to that of Civil War, which has latterly obtained considerable currency as a milder expression. Whether it was a rebellion or a civil war could only be decided by its result. If it had been successful, it would have decided that the United States had never been a nation in its domestic relations, and the conflict between the States of a voluntary confederacy might very properly have been termed a civil war. As it was unsuccessful, and as the nation maintained its previous and future entity, the logic of events has stamped the struggle as a rebellion by individuals, not a civil war between States. It is true that many of the enactments of Congress and of the judicial decisions from 1861 to 1867 can only be explained on the theory that the war was maintained against States: these instances have been collected by Mr. Hurd, as cited below. But they are opposed by more numerous instances to the contrary, and are rather proofs of haste than of a consistent theory or policy. Legally, it may have been a civil war as well as a rebellion; politically, it was a rebellion only. Mr. A. H. Stephens, who regards the struggle as a revolution by which a voluntary confederacy was transformed into a nation, very properly entitles his history of it *A Constitutional View of the War Between the States*; but even he would be compelled to call any



similar struggle in the future a rebellion. The name is retained here, therefore, not in any invidious sense, but as one which cannot truthfully be avoided.<sup>1</sup>

After secession became a fact in South Carolina and before the final outbreak of war—that is, between December 20, 1860, and April 12, 1861,—various proposals were made, in Congress and out, to preserve peace and union by further conciliation and compromise. The most important of these proposals was the Crittenden Compromise.

*Crittenden Compromise.*—In 1860 Senator John J. Crittenden, of Kentucky, introduced a proposition to amend the Constitution by dividing the Territories between the two sections on the line of the Missouri Compromise. His amendment was approved by the Legislatures of Virginia, Kentucky, Tennessee, and New Jersey, in their instructions to their delegates to the Peace Conference in 1861,<sup>2</sup> and was vainly urged by him throughout the session of 1860–61. In the House, January 14, 1861, an attempt to substitute it for the report of the Committee of Thirty-Three was lost by a vote of 80 to 113; in the Senate it was brought up March 2d, and lost by a vote of 19 to 20.

Had it been adopted it would have been, in substance, as follows: XIII. Section 1.—Slavery is abolished in all territory, present or future, north of latitude 36° 30'; south of that line it shall be recognized and protected by every department of Government, and never interfered with by Congress. When the Territory becomes a State, its people shall settle its condition, slave or free. Sec. 2.—Congress shall not abolish slavery in forts and other Federal territory in slave States. Sec. 3.—Congress shall not abolish slavery in the District of Columbia so long as Virginia or Maryland permits slavery, nor in any event without consent of the inhabitants, and compensation.

<sup>1</sup> See State Sovereignty.

<sup>2</sup> See Conference, Peace.

Congressmen and Federal office-holders at Washington shall never be prohibited from bringing their slaves thither. Sec. 4.—The inter-State slave trade, by land, river, or sea, shall never be prohibited. Sec. 5.—The United States shall pay the owner the full value of any fugitive slave rescued by violence or intimidation; the United States may sue the county where the rescue took place, for the value paid; and the county, in like manner, may sue the wrong-doer. Sec. 6.—No future amendment shall ever affect the five preceding sections, nor Article I, § 2, ¶ 3, nor Article IV, § 2, ¶ 3, of the Constitution; and no amendment shall ever give Congress power to abolish slavery in a slave State.

To this were added four resolutions: 1, asserting the constitutionality of the Fugitive Slave Law; 2, earnestly requesting the repeal of the personal liberty laws; 3, promising the amendment of the Fugitive Slave Law by making the commissioner's fee the same whether his decision was for or against the claimant, and by restricting the use of the *posse comitatus* to cases of resistance or rescue; and 4, promising the stringent suppression of the African slave trade.

The *Peace Conference* was another notable effort to preserve peace on the basis of Northern concessions. This was a movement within the States, outside of Congress, in which Virginia and Ex-President Tyler took the lead. On January 19, 1861, the Legislature of Virginia passed a series of resolutions inviting the other States of the Union to meet in Washington, February 4, 1861, to unite with Virginia in a final effort "to adjust the present unhappy difficulties, in the spirit in which the Constitution was originally formed, so as to afford the people of the slaveholding States adequate guarantees for the security of their rights." Ex-President Tyler was president of the convention, in which, at different times, as many as twenty-one States were represented. Some of these

delegates were appointed by the State legislatures, some by the governors. The convention was marked by lack of harmony in its membership and proceedings. Some of the Northern delegates, "stiff-backed men," as Zach. Chandler, of Michigan, expressed it, felt that there was no need of further guarantees of Southern rights, and that the resolutions favored by the majority—substantially the Crittenden Compromise—were only another effort of the slaveholding interest to extort by threat of secession that which it had failed to secure at the polls. The body had neither legal authority nor popular confidence, and as it sat with closed doors and voted by States its representative character was considerably impaired. Its proposed constitutional amendment guaranteeing slavery in Territories south of 36° 30' had been voted for in the conference by a very small majority, the votes of three States not being counted, since they were evenly divided. So the recommendation of the conference came to Congress with but little force behind it—Ex-President Tyler himself repudiating its conclusions as unsatisfactory to the South,—and the proposed amendment received but little notice. "The historical significance of the Peace Convention," says Rhodes, "consists in the evidence it affords of the attachment of the border slave States to the Union, and the lingering hope of readjustment in North Carolina and Tennessee" (vol. iii., p. 307). The Union men of these States cherished the vain hope that this convention would adopt a plan that would satisfy the slave States on the border and bring back into the Union those that had seceded. It appears that Tyler was using this "Union Convention" as a means of promoting disunion in Virginia, as on the day after the adjournment of the convention, in a speech from the capitol steps at Richmond, he urged the secession of Virginia on the plea that there was no hope of adjustment. It was concession to Southern interests and not

the preservation of the Union for which Tyler was chiefly concerned.

It is impossible to date the outbreak of the Rebellion exactly. The secession of South Carolina, or of any other State, cannot be taken as the date, for it might have been possible for a State to pass an ordinance of secession, refuse to take part in the government, and yet remain peacefully in the Union so long as the execution of the laws was not resisted. The seizures of Federal forts, arsenals, mints, and vessels in January, 1861, bear far more affinity to a rebellion; and yet these were so irregular and scattered, some of them with, others without, and others disavowed by, the authority of the State, that there seems even yet to have been a *locus penitentiæ* to the participants. But the organization of the new government at Montgomery<sup>1</sup> was a different matter; this was a step which there was no retracing, and with it the Rebellion takes a tangible form. From that time there were two incompatible claims to the national jurisdiction of the seceding States, and neither of the two claimants could exist except by forcibly ending the claim of the other. War was a necessity, and the Rebellion a fact to be acknowledged.

The Rebellion, however, was not at first acknowledged, nor were instant measures taken for its suppression. The responsibility for this mistake has been concentrated by popular belief upon the head of President Buchanan, but it is unfair to deny a very large share of it to the politicians of all parties in and out of Congress, to their complete ignorance of their constituents, of their associates, and of themselves, and to the inevitable tardiness of action in a republic. Hardly a Northern man in Congress felt sure of his footing, or felt certain how far his constituents, who were quietly and steadily working at the plough, or in the office, or at the mill, would support him

<sup>1</sup> See Confederate States.

in the hitherto unheard-of measure of "making war upon a sovereign State." And so, through the whole dreary winter of 1860-61, the air of Congress was redolent with propositions for compromise; with protestations of belief that the seceding States could never mean it, and that the Republic would yet go safely through this crisis; and with appeals to the erring sisters to reason together, to pause a moment, to reflect and see if something might not yet be done; but so far as preparations to suppress the Rebellion were concerned, that Congress, on its final adjournment, was as if it had never existed.

It is not true that Northern politicians hurried the Northern people into the war against the Rebellion; it is rather true that the uprising of the North and West, after the capture of Fort Sumter, April 13, 1861, educated their politicians as they had never been educated before. A decade before, July 22, 1850, Clay had passionately said of Rhett in the Senate: "If he pronounced the sentiment attributed to him, of raising the standard of disunion and of resistance to the common government, if he follows up that declaration by corresponding overt acts, he will be a traitor, and I hope he will meet the fate of a traitor." Unfortunately, it required a popular uprising to bring the average Congressman up to Clay's level.

It is, therefore, almost a waste of space to detail the failures of Congress to act in 1860-61. The President auspiciously opened the session with a message which John P. Hale, in the Senate, very fairly summed up under three heads: "first, that South Carolina has good cause to secede; second, that she has no right to secede; third, that we have no right to prevent her from seceding." Much of the time of the session was consumed in the consideration of proposed compromises,<sup>1</sup> the debates being occasionally interrupted by the farewells and de-

<sup>1</sup> See, for the principal ones, *Compromises*, VI. ; *Congress*, *Peace*.

parture of the Representatives of the States which seceded without waiting to be conciliated.

In the South everything was drifting straight toward war. In Charleston harbor Major Anderson, with his force of eighty men, had abandoned Fort Moultrie, December 26, 1860, and established himself in Fort Sumter, a far stronger position, commanding the mouth of the harbor. The same day commissioners from South Carolina to the President arrived in Washington, but he refused to recognize them officially, and they went home again, January 3d. Thereafter the State continued to erect batteries at every advantageous point around the fort, and these were strong enough to fire upon, January 9th, and drive back the steamer *Star of the West*, with provisions for the fort.

The Confederate Government, immediately after its organization, appointed three commissioners to treat with the Federal Government. These arrived at Washington March 5th, and at once opened communication with Seward, the new Secretary of State. March 15th, Seward refused to recognize them as diplomatic agents of any government, but his reply was not delivered to them until April 8th, on which day official notification was sent to Governor Pickens, of South Carolina, that Fort Sumter would be provisioned at once, and by force, if necessary. On this delay of twenty-three days in delivering the reply, the commissioners based a charge of bad faith against Seward, but it seems to be unjust. Seward seems to have been personally in favor of abandoning Fort Sumter, and the reply was sent only when the rest of the Cabinet had persuaded the President not to yield. The notification to Pickens was effectual in one way. Before the relief expedition could reach the fort, it had been summoned and bombarded, and had surrendered.

Some of the Northern States were at least partially prepared for the struggle. In 1857 and 1858 the militia

of Ohio had been thoroughly reorganized by Governor Chase. Governor Andrew, of Massachusetts, in his inaugural address, in January, 1861, had advised the Legislature to put a part of the militia on a war footing, and immediately afterward had sent an agent to Europe to purchase arms, and invited co-operation by Maine and New Hampshire. January 11th, the New York Legislature voted to offer the whole military force of the State to the Government, and five days later the New York City militia formally offered their services to the President. But all these were exceptional instances, and as a general rule the Northern and Western States were quite unprepared.

The President's proclamation, April 15th, commanding insurgents to disperse within twenty days, and calling for seventy-five thousand of the militia to secure the execution of the laws in the Southern States, met with varying responses. In the South the proclamation was answered by the rapid secession of those States which had hitherto refused to secede, but were opposed to coercion.<sup>1</sup> In the border States, Missouri, Kentucky, Delaware, and, probably most important of all, Maryland, refused to secede, and gradually came over to an acceptance of the idea of coercion. In the North the response to the call for men was instant, and the quotas of the States were filled twice over. One regiment, the Massachusetts Sixth, mustered early on the morning of April 16th, and reached Washington three days afterward, after the first loss of life in the Rebellion, during a street fight with a mob in Baltimore, April 19th. The day before, several hundred unarmed Pennsylvania troops had arrived. April 25th, troops began to pour into Washington, having made their way around Baltimore, and the capital became, as it remained for four years, an entrenched camp.

In the meantime, by alternate proclamations of Presi-

<sup>1</sup> See Secession.

dents Lincoln and Davis,<sup>1</sup> open war had begun, the latter regarding it as a war declared by the United States against the Confederate States, the former as the suppression of a rebellion. The two difficulties which most embarrassed President Lincoln are elsewhere detailed<sup>2</sup>; but, besides these, there were others, more serious, if not so annoying. The loss of Harper's Ferry, April 18th, involved a loss of very much of the Government machinery for making arms. The burning of Gosport Navy Yard, April 20th, almost annihilated the little remnant of the Federal navy. The wholesale resignations of Southern-born and even Northern-born officers in the public service had seriously crippled it, and of those who remained it was impossible to know whom to trust, or to be confident that any given officer would not resign without notice and betake himself to Montgomery. The Treasury had been so nearly bankrupted in the preceding December that the robbery of about \$1,000,000 from the Indian trust fund in the War Department could hardly be made good. An army, navy, and treasury were to be evolved out of nothing, by an Administration and a people who knew nothing of war, and all was to be done without legal appropriations of money or authorization by law, for Congress, by the President's summons, was not to meet until July 4th.

For this failure to summon the special session for an earlier date, Lincoln has been sometimes severely censured, but it was either very fortunate, or the result of a wise forecast. So late as July there were among the members of Congress several, such as Breckinridge and Burnett, of Kentucky, who were with the Confederacy in spirit, and were soon afterward with it in the body. The number of such would undoubtedly have been much larger if May 1st had been fixed for the meeting of Congress. And, further, Congress would have been divided

<sup>1</sup> See Alabama Claims.

<sup>2</sup> See Habeas Corpus.



and probably incompetent at the earlier date. A part of its members would have come only to renew the tedious attempts at compromise of the past winter, and a part animated only by the enthusiasm of the Sumter rising; and internal dissension would have had more attention than the public good. As it was, when Congress met, the time for conciliation and compromise was evidently past; a sober realization of the enormous task to come had taken the place of the first inconsiderate, and sometimes foolish, excitement; and Congress was a homogeneous body, well fitted for the emergency.

When Congress met, the area of the Rebellion had been fairly defined. Its northern boundary was an irregular line from the Atlantic to the Gulf of Mexico, following the Potomac and the southern boundary of Pennsylvania to the Blue Ridge; then trending southwest through western Virginia and west through southern Kentucky to the Mississippi; thence west through central Missouri to Kansas, and south and southwest to the Gulf of Mexico, taking in the Indian Territory, whose people had replaced their former treaties by new ones with the Confederate States, and Texas. South of this line the whole people was in rebellion, for the sincerest Union men among the local leaders felt bound to obey the final action of the State, and the new national government claimed and received the allegiance of the doubtful mass. Within this line the Southern States stood in the attitude of a beleaguered fortress, covering an area of more than 700,000 square miles, with a line of investiture of 10,500 miles, and containing within it a population of 8,000,000 whites, 1,400,000 of them fighting men, and 4,000,000 blacks, most of whom remained faithful laborers to the end. The military and naval events of the Rebellion need be only briefly summed up here.

At first the Rebellion was to be overthrown by the "anaconda system," if it can be called a system. The

line of investiture was to be assailed at every available point, and the Rebellion was to be pressed to death. In the East this idea had several important results, only one of which, the blockade, was of any use, if the captures of Port Royal and Hatteras are to be considered as an integral part of the blockading system. Outside of the blockade, without which the Rebellion could never have been suppressed, it is very doubtful whether any military operations in the East were ever of any great service, beyond employing a large part of the Confederate armies to counteract them. Even if they had been successful in the first years of the war, they could only have had the distinctly evil result of pushing the Rebellion, with its natural energies unimpaired, into the infinitely stronger positions of its central territory.

In the West the one great object of desire was at first the opening of the Mississippi to the Gulf, and this was effected by the capture of New Orleans, April 24-27, 1862, by the capture of Vicksburg and Port Hudson, July 4 and 8, 1863, and a countless number of subordinate battles. But during this struggle the war had practically been ended, though indirectly, for the enormous wedge of highland east of the Mississippi, running south into the heart of the Confederacy, and the natural citadel of the continent, was almost entirely in the hands of the Western armies. In November, 1864, Sherman's army gathered on the southern edge of the great citadel, and, assured of Thomas's ability to master the only Confederate army in their rear, had only to choose the direction in which they should pour down upon the plains below and push the Rebellion *from* the mountains *to* the coast. Thereafter there could be but one object for the officers and men of the Confederate armies, to maintain undiminished to the end that high reputation for personal bravery which the national armies have always and cheerfully acknowledged. Lee's surrender took place April 9,

1865, and the first amnesty proclamation of President Johnson, May 29th,<sup>1</sup> may be taken as the formal close of the Rebellion, though isolated surrenders continued throughout the following month.

During this long struggle, another was going on at Washington, even more difficult. In the field the general line of success was only developed when the original disadvantages of civil life had worn away, when the original leaders, who fought with one eye on the war and the other on home politics, had been eliminated or forced to subordinate positions, and when the new group of professional soldiers had been developed, Grant, Sherman, Sheridan, McPherson, and others, who were for the time absolutely reckless of political and civil considerations, and who knew but one object—war. But at Washington no such development could or ought to have taken place. There politics had to have at least an equal consideration with war, and the difficulties arising from the complication of the two subjects did not cease even with the cessation of the war itself.

The Thirty-seventh Congress met July 4, 1861. In the Senate there were thirty-one Republicans and eighteen opposition, ten of the latter being Democrats, and eight "Unionists," remnants of the old "American party," such as Garret Davis, of Kentucky, and Anthony Kennedy, of Maryland, supporters of the war, and opponents of every interference with slavery. In the House there were 106 Republicans and seventy-two opposition, forty-two of the latter being Democrats and thirty "Unionists." The House voted to consider at this session only bills relating to the military, naval, and financial operations of the Government; and July 15th, by a vote of 121 to 5, it pledged itself to vote any number of men and any amount of money necessary to put down the Rebellion. Laws were passed, by heavy majorities,

<sup>1</sup> See Amnesty.

to authorize a loan of \$250,000,000, to define and punish conspiracy, to increase the tariff, to appropriate money for the army and navy, to suppress insurrections, to authorize the President to collect the revenue in Federal vessels or to close Southern ports in case collection was impossible (July 13th), to call out 500,000 volunteers, if the President should think so many necessary (July 22d), and to confiscate property, including slaves,<sup>1</sup> if permitted to be employed against the Government (August 6th). A resolution to validate and confirm the President's "extraordinary acts, proclamations, and orders," his calling out men, blockading Southern ports, and suspending the privilege of the writ of *habeas corpus*, failed to pass, but was made the third section of the act of August 6th, to increase the pay of the army.<sup>2</sup>

An important act of the session was the passage of a resolution that the war had been forced on the Government by Southern disunionists; that it was waged by the Government in no spirit of oppression, and for no purpose of conquest, subjugation, or interfering with the rights or established institutions of the seceding States, but to defend and maintain the supremacy of the Constitution, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; and that, as soon as these objects were accomplished, the war ought to cease. It passed the House, July 22d, by a vote of 117 to 2, and the Senate, July 26th, by a vote of 30 to 5.<sup>3</sup> August 6th, Congress adjourned, having voted all that the Executive had asked for.

When it reassembled in December the scattered drops of July had settled down into the heavy and steady storm of war which was to beat upon the country for more than three years to come. From the first day of meeting, it was evident that Congress had very

<sup>1</sup> See Abolition, III.

<sup>2</sup> See Habeas Corpus.

<sup>3</sup> See Reconstruction.

considerably changed its views as to the proper mode of dealing with slavery. In both Houses a large number of resolutions were immediately introduced, looking toward emancipation, and with them began the course of legislation which ended in the general abolition of slavery.<sup>1</sup>

These acts were then, and have since been, denounced as in violation of the good faith pledged in the resolution of July 22d, above mentioned. That resolution undoubtedly expressed what was then the policy and intention of both Congress and its constituents, when the magnitude of the war was not yet apparent, and its interdependence upon slavery was not yet plainly perceived. But a congressional resolution is certainly not a part of the organic law, but a mere piece of legislation open to change or repeal at any moment. Other governments are never reproached for vitally changing their policy as a war in which they are engaged grows more desperate. It is a tribute, though sometimes a provoking tribute, to the exceptional good faith of the American Republic, to find canons of good faith laid down for it which would not be considered applicable elsewhere.

Outside of anti-slavery legislation, and the appropriation bills, the most important action of the session was the act of February 25, 1862, authorizing the issue of \$150,000,000 non-interest-bearing notes, receivable for all dues to the United States, except duties on imports, and for all claims against the United States, except interest on the public debt, and a legal tender for all debts, public and private, within the United States, with the exceptions above noted, which were to be paid in coin. The legal-tender clause was much disliked by Secretary Chase, who only finally yielded to it on the score of military necessity, and as a war measure.

This development of anti-slavery feeling and action in the dominant party, the preliminary proclamation of the

<sup>1</sup> See Abolition, III. ; Fugitive Slave Laws ; Wilmot Proviso.

President looking toward emancipation,<sup>1</sup> and the summary suppression of opposition to the war by arrest,<sup>2</sup> produced almost a complete political change of relations in the North. Hitherto, Democrats in and out of Congress had very steadily voted for all measures designed to suppress the Rebellion by arms, while they as steadily accompanied their votes with the declaration that the Republicans, by abolition agitation, had been as much to blame for the war as the secessionists. They now alleged that the new anti-slavery policy had been adopted mainly for the purpose of forcing their party into an attitude of opposition to the war itself. If there was any truth in the charge, the manœuvre was successful: the Democratic party gradually became a peace party,<sup>3</sup> and those of its members who were willing to include slavery as one of the vulnerable points of the Confederacy were forced into the "Union party," as the Republican party was henceforth frequently termed.

The first results of this *bouleversement* were unfavorable. In the autumn elections of 1862 the great Middle and Western States, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, and Wisconsin, all of which had voted for Lincoln in 1860, gave Democratic majorities. But, as it happened, the Democrats gained and the Republicans lost little by these elections: in only two of these States, New York and New Jersey, the election involved a change of State government; and in the members of the House of Representatives of 1863-5, chosen this year, the Republican majority was hardly impaired. The results were just sufficient to confirm the Democrats in opposition to the war, and the Republicans in active opposition to slavery, while it should have been evident that, as the two ideas became familiar in the

<sup>1</sup> See Emancipation Proclamation.

<sup>2</sup> See *Arbitrary Arrests*, under Habeas Corpus.

<sup>3</sup> See Democratic Party, VI.

future, the tide of recruits must run steadily from the Democrats to the Republicans, and no longer from the Republicans to the Democrats. The Democratic party touched high-water mark in 1862-3; thereafter it could only recede.

The session of Congress which began in December, 1862, was used by the Republicans mainly in securing the positions which they had already gained, and in making the necessary appropriations for the war. No great advance was made in anti-slavery legislation, except that the final Thirteenth Amendment was introduced and left to become familiar. The fundamental idea of final reconstruction by Congress was also plainly put into form, and left to become familiar.<sup>1</sup> In practical legislation the great features of the session were the Conscription Act,<sup>2</sup> by which the national power to compel the military service of its citizens was for the first time declared and maintained; and the National Bank Act of February 25, 1863. West Virginia was admitted (see that State); and the suspension of the writ of *habeas corpus* was confirmed and regulated.<sup>3</sup> The appropriation for the navy this year footed up \$71,041,401.01; and for the army \$729,861,898.80, with \$108,807,645.20 for deficiencies.

The wonderful tenacity with which the majority in Congress held its ground during this last session, taking no step backward on the slavery question, and actually advancing in other respects, in the face of the adverse majorities of 1862, was fully justified by the event. Every day increased the number of Democrats to whom the idea of emancipation as an incident of the war became less dreadful as it became more familiar. July 4, 1863, seems to have been the political as well as the military turning-point of the war. From that day it was certain that the Confederate armies in the East were to be so held in play as to be unable to defend successfully

<sup>1</sup> See Reconstruction.

<sup>2</sup> See Drafts.

<sup>3</sup> See Habeas Corpus.

their vital point in the West. Nothing succeeds like success; and every mile of advance by the Western armies was a new guarantee to the Republicans of security for the past and for the future. Everything had been gained and nothing lost, and it was only necessary now to pass at leisure the crowning amendment for general emancipation, and to wait patiently while the armed forces worked out the already secured political future. The autumn elections of 1863 were not generally for important offices; but they indicated a strong Republican gain for the first time since 1860; and in the States of Ohio and Pennsylvania, where the control of the State government was involved in the election, the Republican majority was decisive.

A new Congress met in December, 1863, the Republican majority being 36 to 14 in the Senate, and 102 to 84 in the House. Its action was mainly confined to the routine business necessary for prosecuting the war, and to the amendment and enforcement of previous legislation. Provision was also made for the admission of Nevada, Colorado, and Nebraska as States, and for the repeal of the fugitive slave laws (see that title). A first attempt was made to pass the Thirteenth Amendment; the portentous question of reconstruction was fairly introduced; and the existence of the new class of professional soldiers was recognized by the revival of the grade of lieutenant-general commanding all the armies. This last grade was intended to be filled by General Grant.

With the adjournment of this session of Congress, the political history of the Rebellion practically ends. Little was to be done by the dominant party, beyond gathering up the fruits of victory, and drawing breath for the coming struggle of reconstruction. Lincoln's re-election, in the autumn of 1864, hardly doubtful in the event of any action by the opposition, was made certain by the Democratic peace platform of that year. This was followed



by the final adoption of the Thirteenth Amendment, abolishing slavery, the only work of the session of 1864-5 which rises above routine. During the year, it was ratified by the States.

Throughout the political work of Congress in these eventful four years, its main characteristics are its general reflection of the will of its constituency, its openness, and its determined resolution to retain the supremacy of Congress over the generals and armies in the field. In the last two points it differed absolutely from its rival, the Confederate congress.<sup>1</sup> At the opening of the war, while most of the military leaders retained the habits of civil and political life, these characteristics led to many evils: annoying interferences and conflicts by the committees on the conduct of the war, with various military leaders; needless assertions of power and dignity by the disputants; and the revelation in the debates, of things in which not only military science, but common-sense, should have dictated secrecy. But these evils cured themselves. As the new class of generals grew up, habituated to regard Congress as a master, not as a would-be tyrant, Congress itself learned self-control by bitter experience; and the war ended with entire harmony between the civil and military agents in it.

Nor can it be doubted now that Congress generally reflected the will of its constituents. The single plausible exception is the winter of 1862-3, above referred to. But, in that instance, the majority in Congress, if its members chose to risk their political existence on the supposition, had a fair right to presume, 1, that the elections of 1862 were lost through their own lack of importance, and the consequent neglect of many Republicans to take part in them; 2, that the coincident choice of a Republican majority in the next Congress was a fair popular indorsement of their own change of policy; and, 3, that

<sup>1</sup> See Confederate States.

every indication showed that the popular tide in their favor would inevitably be strengthened by the success of the Union forces, without which any policy would, of course, have proved a failure. The result proved that in all three suppositions they were correct.

TREASON.—Under the Confederation there was no such legal offence as treason against the United States, since there was no such thing as allegiance to the United States. Treason and allegiance had reference only to the State. A remnant of this feeling made the definition of treason, when it was first introduced into the convention of 1787, August 6th, consist in “levying war against the United States, *or any of them*, and in adhering to the enemies of the United States, *or any of them*.” The clause was fully debated, August 20th, and changed to its present form.<sup>1</sup> But all the debaters professed themselves dissatisfied with it. Gouverneur Morris acutely pointed out the fact, that “in case of a contest between the United States and a particular State, the people of the latter must be traitors to one or the other authority.” But a motion to give Congress the “sole” power to define the punishment of treason was lost, five States voting for it and six against it. Seldom has the omission of a single word had more momentous effects. In this case it left to Congress and the States, as almost all the speakers acknowledged, a concurrent power to punish for treason; and so it enabled a seceding State to offer to its minority a choice between treason against the State and treason against the United States. Had the vote been six States to five for the insertion of the word, the State sovereignty and secession arguments would hardly have been worth the trouble of refuting.

Had the Constitution given to Congress the “sole” power to define the punishment of treason, the States would have been remitted, for protection against such

<sup>1</sup> See Constitution, Art. III., § 3.

domestic disturbances as Dorr's Rebellion, to a simple law against seditious assemblages; and the protection would have been efficient. As it is, most of the States have inserted in their constitutions a provision that "treason against the State of — shall consist only in levying war, etc.," following the Constitution of the United States. These provisions have always been practically *in nubibus*: there has hardly been a case of indictment for treason against a State, excepting the action of Rhode Island in the Dorr case, and that came to nothing. But they fostered the idea of allegiance to a State, and thus carried into secession the multitude who disliked secession, but dreaded to commit treason against the State.

At the end of the Rebellion there were no prosecutions for treason. It has been roundly asserted that the reason for this was the consciousness of the Government of the United States that it had been illegally suppressing a misnamed rebellion, that treason could only hold against a State, and that Jefferson Davis and his associates had committed no crime and engaged in no treason, in any sense known to the Constitution or its framers. Those who so argue forget that Mr. Davis, at least, was no prisoner of war; that his surrender was unconditional and in a territory under military occupation; and that, if there had been any such impotent spite against him as this theory assigns to the Government, a drum-head court-martial and a file of men would quickly have made it patent, treason or no treason. The fact seems to be that his escape was due entirely to lack of spite. The collapse of the Rebellion had been too complete to allow of spite. The nation stood aghast as it realized the thoroughness of its work; and its controlling impulse was to efface as rapidly as possible all evidences of the conflict. Treason trials would have been a festering sore in the body politic, and they were avoided.

There can be no doubt that this policy was just, as well

as wise. For seventy years before 1860, men who did not realize the full force of what they said had been boasting of the "voluntary" nature of the Union, in contrast with the effete despotisms of Europe. The nation's long *laches* in asserting its paramount authority in the last resort gave Jefferson Davis and his associates an exemption from the animus of treason which can never be claimed again. All men have now had fair warning, as Jefferson Davis had not in 1860, that the Union is not "voluntary," so long as the nation is determined to maintain it; and that any attempt to break it up is treason to the United States, even if it is obedience to a State. It might be that a future rebellion would be suppressed with a similar generous forbearance from ultimate vengeance; but the chance is an uncommonly small one.

The act of April 30, 1790, made death the penalty for treason, as defined in the Constitution, on conviction by "confession in open court, or on the testimony of two witnesses to the same overt act." It also made fine and imprisonment the punishment of misprision of treason, the concealment of it. For seventy years this act was sufficient. There were few trials under it, the principal one being that of Burr; and these were practically failures. In 1861 an act was passed making conspiracy to oppose the laws or seize the property of the United States a high crime, but this was punishable only by fine and imprisonment. The act of July 17, 1862, provided that, if any person should thereafter commit the crime of treason against the United States, his slaves, if any, should be declared free, and he himself should suffer death, or fine and imprisonment, at the discretion of the court; that any one convicted should forever be incapable of holding office under the United States; and that it should be the duty of the President to seize and apply to the use of the army the property of six classes of leaders of the Rebellion, who seem to have been considered

*prima facie* guilty of treason. There were, finally, no Southern prosecutions under it. Davis and others were indicted, but never brought to trial. The few prosecutions were in Northern States.

On the Rebellion for the special lines of work done by the Congresses of 1861-5, see Abolition, III.; Amnesty; Banking; Construction; Distilled Spirits; Drafts; Electors, III.; Freedmen's Bureau; Fugitive Slave Laws; Habeas Corpus; Internal Improvements; Internal Revenue; Monroe Doctrine; Reconstruction, I.; Slavery; Wilmot Proviso; and the authorities cited under them. See also (General) 2, 3 Draper's *History of the Civil War*; 12-14 *Stat. at Large*; Moore's *Rebellion Record*; Guernsey and Alden's *Pictorial History of the Rebellion*; Appleton's *Annual Cyclopædia* (1861-5); 3 Wilson's *Rise and Fall of the Slave Power*; 2 Greeley's *American Conflict*; Victor's *History of the Rebellion*; 4 Bryant and Gay's *History of the United States*; Botts's *Great Rebellion*; Pollard's *Lost Cause*; (Political) McPherson's *Political History of the Rebellion*; Raymond's *Life of Lincoln*; Giddings's *History of the Rebellion* (to 1863); Wilson's *Anti-Slavery Measures in Congress*; Hurd's *Theory of Our National Existence* (index under *States, Status of*); Boutwell's *Speeches and Reports*; H. W. Davis's *Speeches and Addresses*; Hurlburt's *McClellan and the Conduct of the War*; 2 A. H. Stephens's *War Between the States*; Harris's *Political Conflict*; Gillet's *Democracy in the United States*; (Military) Callan's *Military Laws of the United States*; Wilson's *Military Measures in Congress*; Count of Paris's *History of the Civil War*; Gen. U. S. Grant's *Report of the Armies* (1864-5); *Reports of the Committees on the Conduct of the War*; W. T. Sherman's *Memoirs*; Swinton's *Twelve Decisive Battles of the War*; Appleton's *Campaigns of the Civil War*; Ingersoll's *History of the War Department*; Boynton's *History of the*

*Navy During the Rebellion; Records of the Rebellion; Confederate Official Reports* (1863); (Financial) Schuckers's *Life of Chase*, 216, 293; Von Hock's *Die Finanzen der Ver-Staaten*; *Laws of the United States Relating to Loans and Currency* (to 1878); Spaulding's *History of the Legal Tender Paper Money of the Rebellion*; Noyes's *Thirty Years of American Finance*; Rhodes's *History of the United States*; Perry's *Elements of Political Economy*, 459; Gibbons's *Public Debt*; McPherson's *Index of House Bills on Banks, Currency, Public Debt, Tariff, and Direct Taxes* (1875); Lamphere's *United States Government*, 44; John Sherman's *Select Speeches on Finance*; Nimmo's *Customs Tariff Legislation*; and, in general, Bartlett's *Literature of the Rebellion* (6073 titles of books, pamphlets, and magazine articles relating to the Rebellion, directly or indirectly, up to 1866).

On Treason see Story's *Commentaries*, §§ 1290, 1790; *ib.*, § 1795 (for law cases); Whiting's *War Powers* (10th ed.), 95; the State sovereignty view of treason is in Bledsoe's *Is Jefferson Davis a Traitor?* and Centz's *Republic of Republics*, 413 foll. (see also index under *Treason*); *Indianapolis Treason Trials*; *The Milligan Case*; for the indictment against Davis see Schuckers's *Life of Chase*, 534; the act of April 30, 1790, is in 1 *Stat. at Large*, 112; the act of July 17, 1862, is in 12 *Stat. at Large*, 589.

<sup>1</sup> P. C. Centz (Plain Common Sense) was a pseudonym.

## CHAPTER XIII

### POLITICAL EVENTS OF THE CIVIL WAR

**L**INCOLN had been elected upon the issue of restricting the area of slavery. His first purpose on coming into power was to restrict the area of secession. He wished to hold to the support of the Union the conservative men who favored the Union with slavery, and who believed that an attempt at forcible coercion, an attempt to pin the Union together by the bayonet, was not only useless but pernicious. Many of these men were in the border States and Lincoln's attitude toward those States,—his desire to save them for the Union—will serve to explain his conservative policy toward slavery for the first year of his Administration. This conservative policy is indicated by the spirit of his inaugural address, by his attitude toward Butler's contraband order, toward the confiscation acts, the military emancipation of Frémont and Hunter, and, generally, toward the radical anti-slavery members of the Republican party as they urged him to a more positive anti-slavery policy. The political history of the war can best be studied by noticing the successive steps and influences by which the Administration turned from mere Union-saving purposes in the conduct of the war to promoting also the cause of emancipation. This study will suggest also the measures and principles on which the Democratic opposition arraigned and opposed the Administration. The most of these topics are discussed in the articles that follow. In addi-

tion to the suggestions of these articles the student would do well to notice the correspondence between Mr. Lincoln and Mr. Greeley on the policy of the war toward slavery<sup>1</sup>; Lincoln's policy of compensated emancipation urged on the border States in the spring of 1862; the correspondence between Mr. Lincoln and the Ohio and New York Democrats on the Vallandigham case, in 1863<sup>2</sup>; and that between Lincoln and Seymour on the draft riots; the results of the elections of 1862, and the party platforms and policies of 1864. The articles on Rebellion, Emancipation, and the accompanying articles and authorities will serve sufficiently as a basis for this study.

**THE EMANCIPATION PROCLAMATION.**—The war against the Rebellion of 1861 was for nearly eighteen months confined carefully to operations against the armed forces in the field, not against slavery.<sup>3</sup> During most of this time President Lincoln listened apparently unmoved to importunate demands from extreme abolitionists in all parts of the North for a declaration against slavery. He declared that his paramount object was the maintenance of the Union; that if he could save the Union without freeing any slave, he would do it; that if he could save it by freeing all the slaves, he would do it; and that if he could save it by freeing some and leaving others alone, he would do that. It was not until the summer of 1862 that he finally decided that the time had come for striking at slavery. September 22, 1862, without any previous general intimation of his purpose, he issued a preliminary proclamation, warning the inhabitants of the revolted States that, unless they should return to their allegiance before the first day of January following, he would declare their slaves free men and

<sup>1</sup> Greeley's *Prayer of Twenty Millions*, August 20, 1862.

<sup>2</sup> See McPherson's *History of the Rebellion*, pp. 163-175.

<sup>3</sup> See Abolition, III.; Rebellion.



maintain their freedom by means of the armed forces of the United States.

This proclamation had no effect, and indeed was hardly expected to have any effect, in bringing back individuals or States to the control of the Federal Government. A retaliatory proclamation was issued by President Davis, December 23, 1862, ordering the hanging of General Benjamin F. Butler, if captured, and the transfer of captured negro Federal soldiers and their white officers to the authorities of the States for punishment.

The Emancipation Proclamation proper was issued January 1, 1863. It recited the substance of the preliminary proclamation, in which President Lincoln had promised to "designate the States and parts of States, if any, in which the people thereof should be in rebellion against the United States," and in which alone emancipation was to take effect; they included all the States which had seceded,<sup>1</sup> with the exception of the forty-eight counties of Virginia now known as West Virginia, seven other counties of Virginia (including the cities of Norfolk and Portsmouth), and thirteen parishes of Louisiana (including the city of New Orleans). The excepted parts were, "for the present, left precisely as if this proclamation were not issued"; as to the district still in rebellion, the proclamation ordered and declared "that all persons held as slaves within said designated States and parts of States are and henceforward shall be free; and that the Executive Government of the United States, including the military and naval authorities thereof, will recognize and maintain the freedom of said persons." It enjoined upon the freedmen the duty of abstaining from all violence, except in self-defence, and declared that those of their number who were of suitable condition would be received into the military and naval service of the United States. It concluded as follows: "and upon this act,

<sup>1</sup> See Secession.

sincerely believed to be an act of justice, warranted by the Constitution upon military necessity, I invoke the considerate judgment of mankind, and the gracious favor of Almighty God."

The validity of such a proclamation is hardly to be seriously questioned, and never would have been questioned but for the natural revulsion from so searching an application of the laws of war in a country which had hitherto enjoyed an almost entire exemption from actual warfare. Its authority is well expressed in its preamble; it was issued by Abraham Lincoln, President of the United States; not by virtue of any powers directly entrusted by the Constitution to the presidential office, but "by virtue of the power in him vested as commander-in-chief of the army and navy of the United States in time of actual armed rebellion against the authority and government of the United States, and as a fit and necessary war measure for suppressing said rebellion."

It must be remembered that the powers of the President as commander-in-chief, subject to the laws of war as recognized by all civilized nations, are distinctly recognized by the Constitution; that these powers are brought to life and action by the existence of defensive war or by the exercise by Congress of its power to declare war, and are controlled by Congress through its action in furnishing or refusing troops and supplies to the commander-in-chief; and that the Emancipation Proclamation and other war measures are therefore as much the work of the representatives of the people in Congress assembled as of their executive officer, the commander-in-chief.<sup>1</sup> Among the powers of a commander-in-chief, when governing conquered soil under military occupation, is that of freeing the slaves of the inhabitants. It may even be exercised, subject to the approval of the commander-in-chief, by subordinate commanders.<sup>2</sup> So long, then, as

<sup>1</sup> See War Powers.

<sup>2</sup> See Abolition, III.

the Constitution vests the President in time of war with the powers of a "commander-in-chief," and permits Congress to call those powers into life and activity by declaring war, it is hardly necessary to defend the validity of the Emancipation Proclamation.

The effect of the proclamation, however, in the absolute abolition of slavery, is a different and more doubtful question; it has been warmly asserted that it had no effect whatever, and theoretically the case against it is very strong. The singular feature of the proclamation is that it purports to free the slaves, not of the soil which was then under military occupation, but of that which was not under occupation, and which, therefore, did not come under the jurisdiction of the President as commander-in-chief. Those portions of Virginia and Louisiana which had been conquered by the forces of the United States, and were under military occupation at the time, were expressly excepted from the operation of the proclamation; and in the States designated for the operation of the proclamation Mr. Lincoln had no constitutional power as President, and no physical power as commander-in-chief, to free a single slave. It seems to be apparent, then, that the proclamation had, *eo instante*, no effect whatever, if we follow its own terms, and that the slaves in the designated States and parts of States were no more free January 2, 1863, than December 31, 1862.

The objection, however, may be obviated if we consider the proclamation as one whose accomplishment was to be effected progressively, not instantaneously, taking effect in future as rapidly as the Federal lines advanced. It would then be, as its author doubtless designed it to be, a general rule of conduct for the guidance of subordinate officers in the armed forces of the United States, a conciliation of a large portion of the inhabitants of the hostile territory by interesting them in the success of the Federal

arms, and an announcement to the world that, without further formal notice, each fresh conquest by the Federal armies would at once become free soil.

The question whether slavery was abolished by the proclamation or by the Thirteenth Amendment has never been directly before the Supreme Court for decision, but instructive reference to it will be found in the cases in *Wallace's Reports* cited below. The only cases which hold that slavery was abolished by the proclamation, and instantly, are those in Louisiana and Alabama cited below.<sup>1</sup>

The political results of the proclamation are almost beyond calculation, and can only be summed up briefly.

1. Foreign mediation by armed force, which had been an important possible factor while the struggle was merely one between a Federal union and its rebellious members, passed out of sight forever as soon as ultimate national success was authoritatively defined as necessarily involving the destruction of slavery; from that time any effort by the governments of France and Great Britain to force the Government of the United States to recognize the Confederate States as a separate slaveholding nation would have excited the horror and active opposition of a very large and influential portion of their own subjects.

2. In the North it alienated all the weak or doubtful members of the Republican party, and made it a compact, homogeneous organization, with well defined objects, and with sinews toughened to meet the novel and important questions which followed final success.<sup>2</sup> The defeats of the Administration in the State elections of 1862-3 were the training-school in which the party attained the extraordinary cohesiveness which carried it unbroken through the struggle between Congress and President Johnson.

3. In the South the fact that such a proclamation was

<sup>1</sup> See Abolition, III.; Slavery.

<sup>2</sup> See Reconstruction.

possible, without exciting any greater opposition in the North, seems to have revealed to many thinking men the enormous extent of the political blunder of secession. But three years before, John Brown had been hanged by the State of Virginia, and the North had looked on with general indifference or approbation; now, the promulgation of this proclamation met either with the vehement approval of the dominant party in the North, or with such feeble symptoms of opposition as the resignations of a few subordinate army officers, or the falling off of a small percentage in the Republican vote. From this time there was a steady increase in the number of those in the South who fought with the energy of despair, instead of the high self-confidence with which they had entered the conflict, and who felt that the leaders, by prolonging the struggle, were only fanning to a hotter flame that most powerful, though sluggish, political force, the wrath of a republic.

HABEAS CORPUS.—The writ of *habeas corpus* is grantable as a matter of right, on a proper foundation being made out by proof, and was familiar in England under common law from very early times; but the judges, who were dependent on the King's pleasure for their tenure of office, evaded giving it whenever the King's pleasure was involved. The personal liberty of the subject was therefore at the King's mercy whenever the words "*per speciale mandatum regis*" ("by special command of the King") were inserted in the warrant. After a long struggle the famous *habeas corpus* act of 31 Car. II., c. 2, was carried through Parliament in 1679, and gave a sanction to that which before had none, by imposing heavy penalties on the refusal of a judge to grant, or of any person to obey promptly, the writ of *habeas corpus*. The bill had several times passed the House of Commons, but failed in the Upper House; and its final passage by

the Lords was by a trick, if we are to believe Burnet's story.

"It was carried by an odd artifice in the House of Lords. Lord Grey and Lord Norris were named to be the tellers. Lord Norris being a man subject to vapors, was not at all times attentive to what he was doing; so, a very fat lord coming in, Lord Grey counted him for ten, as a jest at first; but, seeing Lord Norris had not observed it, he went on with his misreckoning of ten. So it was reported to the House, and declared that they who were for the bill were the majority, though it indeed went on the other side."

This act, in substance, has been made a part of the law of every State in the Union, and the Constitution of the United States has provided that the privilege of the writ shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it. It has been judicially decided that the right to suspend the privilege of the writ rests in Congress, but that Congress may by act give the power to the President. Such an act bears some resemblance to the decree of the Roman senate, in civil dissensions or dangerous tumults, that the consuls "should take care that the republic should receive no harm" (*ut consules darent operam ne quid detrimenti respublica caperet*).

The resemblance, however, must not be carried very far: the Roman decree gave the consuls absolute power over the life of any citizen, and power to levy and support armies; but a suspension of the privilege of the writ of *habeas corpus* by Congress only allows the Executive to detain in custody without interference by civil courts, or to try by military law, prisoners who are taken in battle, or are residents of hostile territory, or are in the military or naval service, or are within the actual circle of armed conflict where courts are impotent; and no power in the United States can lawfully take away the privilege of the

writ from private citizens in territory not rebellious or invaded, and where the Federal courts are in regular operation.<sup>1</sup> Nevertheless, the suspension of the writ is in so far a suspension of the personal liberty of the citizen.

In such an extraordinary emergency as that of April, 1861, when Congress is not in session to pass a suspending act, the President may suspend the privilege of the writ within the theatre of actual warfare, by virtue of his powers as commander-in-chief; if he chooses to risk any more general suspension he must trust for validation of his action to a subsequent act of Congress.<sup>2</sup>

The writ is granted by State courts as a general rule, and by Federal courts only when the imprisonment is under color of Federal authority, or when some Federal right is involved in the case. The act of 1789 gave Federal courts the power to issue the writ when necessary for the exercise of their respective jurisdictions, except that prisoners in jail under sentence or execution of a State court could only be brought to the Federal court under *habeas corpus* as witnesses.

The troubles in 1831-2<sup>3</sup> caused the passage of another act giving the power to Federal courts to issue the writ where a prisoner was committed by a State court for an act done in obedience to a Federal law (such as a tariff act). In 1842 McLeod's case caused the passage of an act which gave Federal courts the power to issue the writ where a prisoner was committed by a State court for an act done in obedience to a foreign state or sovereignty and acknowledged by international law.<sup>4</sup>

In 1867, in order to carry out the amendment abolishing slavery, an act was passed which gave Federal courts the power to issue the writ where a person was restrained of his liberty in violation of the Constitution or of any

<sup>1</sup> See "Milligan Case" below.

<sup>2</sup> See Rebellion.

<sup>3</sup> See Nullification.

<sup>4</sup> See McLeod Case.

law or treaty. But the Supreme Court has determined that in no case can a State court on *habeas corpus* release a prisoner committed by a Federal court, and that in case of such a writ being issued the officer is not to obey it further than to make return of the authority by which he holds the prisoner. Nevertheless, such writs are issued and obeyed, but only by acquiescence of Federal officers.

In the United States the privilege of the writ was never suspended before 1861 by the Federal Government, though State governments, as in the case of the Dorr Rebellion, had done so, and Federal officers, as in the Burr conspiracy, and in Jackson's case at New Orleans, had refused to obey the writ. January 23, 1807, the Senate, moved by a message detailing Burr's progress, passed a bill suspending the writ for three months in case of arrests for treason, and requested the speedy concurrence of the House. January 26th, the House, by a vote of 123 to 3, decided not to keep the bill secret as the Senate had done, and, by 113 to 19, voted that the bill "be rejected," a contemptuous and unusual mode of procedure.

*Arbitrary Arrests.*—On the breaking out of the Rebellion President Lincoln, after calling out seventy-five thousand men and proclaiming the blockade, authorized the commanding general, April 27, 1861, to suspend the writ of *habeas corpus* between Philadelphia and Washington, and, May 10th, extended the order to Florida. May 25th, on the application of John Merryman, Chief Justice Taney issued a writ of *habeas corpus* to Gen. Geo. Cadwallader, and, on his refusal to obey, attempted to have him arrested. When the attempt failed, the Chief Justice transferred the whole case to the President. July 5th, Attorney-General Bates gave an opinion in favor of the President's power to declare martial law and then to suspend the writ, and the special session of Congress, to avoid all question, subsequently approved and validated



the President's acts in all respects as if they had been done by express authority of Congress. Thereafter "arbitrary arrests" proceeded with great vigor throughout the North, by orders from the State Department alone at first, and then concurrently with the War Department until February 14, 1862, when the latter department, under Secretary E. M. Stanton, assumed the entire power of arrest. From July to October, 1861, 175 persons were summarily imprisoned in Fort Lafayette alone, and the arrests were kept up through 1861 and 1862, including State judges, mayors of cities, members of the Maryland Legislature, persons engaged in "peace meetings," editors of newspapers, and persons accused of being spies or deserters, or of resistance to the draft. September 24, 1862, the suspension was made general by the President so far as it might affect persons arrested by military authority for disloyal practices. These summary arrests provoked much opposition throughout the North, and influenced the State elections of 1862 very materially; and an order of the War Department, November 22, 1862, released all prisoners not taken in arms or arrested for resisting the draft.

As yet the suspension had been only by executive authority, and the writs which were still persistently issued by State courts were founded on a long line of express decisions that the power to suspend the privilege of the writ lay in Congress, not in the President. By act approved March 3, 1863, Congress authorized the President whenever, in his judgment, the public safety might require it, to suspend the writ anywhere throughout the United States; but the power to issue the writ was reserved to Federal judges wherever—the Federal Grand Jury being in undisturbed exercise of its functions—a prisoner was detained without indictment at the Grand Jury's next session. The arrest, May 4, 1863, of C. L. Vallandigham, ex-member of Congress from Ohio,

his conviction and banishment to the rebel lines, and the arrest of other persons, renewed the excitement in the North.

September 15, 1863, the President by proclamation suspended the writ throughout the United States in the cases of prisoners of war, deserters, those resisting the draft, and any persons accused of offences against the military or naval service. The arrests were thereafter continued with little interference by any authority until August, 1864, when the arrest of a Congressman was made in Missouri. The House of Representatives then ordered an investigation, which exposed and helped to remedy many of the abuses which were inevitable, perhaps, under a suspension of the writ. Its military committee found in the Old Capitol prison officers of rank, some of them wounded in service, who had been in close confinement for months without charges and without the trial which the act of Congress of March 3, 1863, had ordered to be secured to the accused. The exposure was sufficient to prevent a recurrence of the evil for the future, but could do nothing for the past.

October 21, 1864, a general court-martial was held in Indiana and passed sentence of death upon several citizens of the State for treasonable designs; and the case became known as the "Milligan Case," from the name of the principal prisoner, Lampdin P. Milligan. The Federal Circuit Court in Indianapolis granted a writ of *habeas corpus* for them May 10, 1865; was divided in opinion as to releasing them; and certified the whole case to the Supreme Court. Its decision, given in the December term of 1866, overthrew the whole doctrine of military arrest and trial of private citizens in peaceful States. It held that Congress could not give power to military commissions to try, convict, or sentence in a State not invaded or engaged in rebellion and where Federal courts were unobstructed, a citizen who was not

a resident of a rebellious State, nor a prisoner of war, nor in the military or naval service; that such a citizen was exempt from the laws of war, and could only be subject to indictment and trial by jury; that the suspension of the *privilege* of the writ of *habeas corpus* did not suspend the writ itself; that the writ was to issue as usual, and on its return the court was to decide whether the applicant was in the military service, or a prisoner of war, and thus debarred from the privilege of the writ; and that, in short, neither the President, nor Congress, nor the Judiciary could lawfully disturb any one of the safeguards of civil liberty in the Constitution, except so far as the right is given in certain cases to suspend the *privilege* of the writ of *habeas corpus*. All the justices agreed that Milligan was not lawfully detained, and should be discharged. Four of them, Chief Justice Chase being spokesman, dissented so far as to hold that Congress *might* have provided for trial by military commission in cases like that of Milligan, without violating the Constitution, but had not done so.

December 1, 1865, President Johnson, by proclamation, restored the privilege of the writ, except in the late insurrectionary States, and in the District of Columbia, New Mexico, and Arizona. April 2, 1866, a proclamation restored the writ everywhere, except in Texas; and another proclamation, August 20, 1866, restored it in Texas also.

The records of the provost marshal's office in Washington show thirty-eight thousand military prisoners reported there during the Rebellion. Among these there were undoubtedly many cases of extreme hardship, the relief of which was always grateful to President Lincoln, when his attention could be directed to them. But under cover of the necessity of guarding against extensive conspiracies in the North, political and private hatreds were frequently gratified by irresponsible subordinates

in a shocking manner, and the trial provision of the act of March 3, 1863, was too often disobeyed; and it is to be feared that the number of cases of this kind which could never be brought to the President's notice was very considerable. Nevertheless, the suspension of the privilege of the writ, in the border States at least, seems to have been unavoidable; and the consequent abuses were but the effects of the wild and blind blows struck at internal treason by a republic unused to war.<sup>1</sup>

In the Confederate States the suspension of the writ by the Federal Government was made the theme of severe criticism; but when it was found that in a single year eighteen hundred cases had been tried in Richmond alone, based on writs of *habeas corpus* for relief from conscription, the Confederate Congress, late in 1863, suspended the writ until ninety days after the meeting of the next session. At the next session the suspension was made permanent, May 20, 1864.

After the close of the Rebellion the Ku-Klux difficulties in the South caused the passage of the act of April 20, 1871, whose fourth section authorized the President, when unlawful combinations in any State should assume the character of rebellion, to suspend the writ of *habeas corpus* in the disturbed district; but the trial provision of the act of March 3, 1863, was retained, and the whole section was to remain in force no longer than the end of the following session. May 17, 1872, a bill to continue this section for another session was passed by the Senate by a vote of 28 to 15. In the House, May 28th, a motion to suspend the rules and pass the bill was lost, 94 to 108. The bill was then dropped and has not since been revived.<sup>2</sup>

DRAFTS. *I. The Draft of 1814.*—The letters of Washington during the Revolution contain abundant evidence

<sup>1</sup> See, in general, Executive, Rebellion.  
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<sup>2</sup> See also Reconstruction.

of the evils of a reliance in war upon the militia, which force he characterized in general December 5, 1776, as "a destructive, expensive, and disorderly mob."

Under the Confederation nothing could be done to improve the discipline of the militia, but, by the Constitution, power to organize, arm, and discipline it was given to Congress, with the idea of thus furnishing a substitute for a standing army. Knox, the Secretary of War, who either had or drew from Hamilton very radical ideas on the subject, submitted to Congress, in January, 1790, a plan for the classification of the militia into an "advanced corps" (eighteen to twenty years of age), a "main corps" (twenty-one to forty-five years of age), and a "reserved corps" (forty-five to sixty years of age). Each corps was to be divided into sections of twelve persons each, and in case of necessity for an army one person was to be taken by lot from each section or from a group of sections of the advanced corps or of the main corps.

Nothing was done with Knox's plan, and the militia law of 1795 simply adopted the State militia systems without any idea of draft or of compelling military service by Federal authority. Knox's idea, however, was not forgotten, and after 1805 Jefferson several times revived it in his messages, but without success. It was as yet evident to the Democratic (Republican) leaders in Congress that the militia was a State institution, and that, when it should be called into the Federal service, the power to select the regiments or organizations to fill the State quota must be in the States exclusively.

When war was declared in 1812, the war party, acknowledging the weakness of the regular army, placed a large but vague reliance upon militia as a reserve force. This confidence was from the first found to be baseless. As soon as the invasion of Canada had called off most of the regular troops from the seacoast, requisitions were made upon the State governors for militia to do garrison duty

in their stead. The call was at once refused by the governors of Connecticut and Massachusetts, on the ground that none of the constitutional contingencies of rebellion, invasion, or resistance to the laws had occurred so as to justify the summons for militia. Even when invasion and blockade compelled the mustering of the militia, long wranglings were induced by the articles of war, which gave regular officers precedence over those of the militia, and thus, as the latter complained, took away the right of the States to officer their own troops. In 1813 a bill for classifying the militia passed the House, but was lost in the Senate.

The excessive demands of Great Britain as the price of peace in the next year revived the war feeling among the people, and increased the necessity for an increase of the army, to which volunteering was incompetent. The State legislatures of New York and Virginia led off in proposing to the Federal Government a classification and draft from the militia.

This plan was recommended by the President in his message of September 20, 1814, and a bill to carry it into effect, mainly drawn up by Monroe, was at once introduced into Congress. It occasioned great alarm and indignation among the Federalists,<sup>1</sup> and even among the Democrats was generally looked upon as of doubtful utility and more than doubtful legality. Nevertheless, it passed the Senate November 10th, and the House December 9th; but in the latter body, probably with a design unfriendly to the bill, the term of service had been reduced from three years to one year. On this convenient issue the two Houses disagreed, and the bill was lost. The "Draft of 1814," as it is often called, was therefore a failure.

*II. The Draft of 1863.*—During the first years of the Rebellion the armies were filled by volunteering, with

<sup>1</sup> See Convention, Hartford.

the exception of an occasional call for militia for short terms. No attempt was made to enforce enlistments. When, February 5, 1863, the debate was opened upon the *Conscription Bill*, its whole theory and defence were based upon the idea of enrolling the militia by Federal authority and drafting individuals therefrom to fill up the President's calls for troops, very much after the plan of the draft of 1814.

It was very soon found impossible to meet the Democratic objections to the constitutionality of a bill for this purpose, and Wilson, of Massachusetts, on the 16th, took the new ground, upon which the act was subsequently upheld by the courts, that the bill was based upon the power "to raise armies"; that it had no reference whatever to the State militia; but that it called every able-bodied citizen of military age into the Federal service, and selected the necessary number by lot.

By the terms of the bill, as it became law March 3, 1863, with the amendments of February 24, 1864, and July 4, 1864, the enrolment of the able-bodied citizens between eighteen and forty-five was to begin April 1st, under the direction of provost marshals; the quotas of congressional districts, under future calls for troops, were to be filled by drafts from the enrolled citizens, in default of volunteering; substitutes were to be accepted; a commutation of three hundred dollars for exemption from the draft was allowed; and all persons refusing obedience were to be punished as deserters.

The application of the draft principle to a call for 300,000 troops early in May was the cause of intense excitement in Eastern cities, where quotas were already in arrears. Charges were made, and to a considerable extent proved, that subordinate officials had so arranged the draft as to bear disproportionately on Democratic districts. Thus, from nine Democratic districts of New York State (with a voting population of 151,243), 33,729

soldiers were to be drafted; while from nineteen Republican districts (with a voting population of 457,257), but 39,626 were to be drafted.

These manifest discrepancies were promptly corrected by the War Department, but the absence of the State militia in Pennsylvania enabled the mob in various cities to resist the draft, with considerable temporary success, as an oppressive, illegal, and partisan measure. New York City was completely at the mercy of the rioters for four days, July 13-16, but in other cities the police force was strong enough to enforce the law. Wherever the draft had been stopped by violence, it was afterward resumed and carried into full effect.

*III. Confederate States' Conscription.*—Conscription in the Southern States preceded and, to some extent, compelled the adoption of conscription by the Federal Government. The act of April 16, 1862, with the amendment of September 27, 1862, was rather a levy *en masse* than a conscription. It made no provision for draft, but placed all white men between the ages of eighteen and forty-five, resident in the Confederate States, and not legally exempt, in the Confederate service.

July 18, 1863, by proclamation, President Davis put the conscription law into operation, and directed the enrolment to begin at once. February 17, 1864, a second conscription law was passed. It added to the former conscript ages those between seventeen and eighteen, and between forty-five and fifty, who were to do duty as a garrison and reserve corps. It excepted certain classes, such as one editor to each newspaper, one apothecary to each drug store, and one farmer to each farm employing fifteen able-bodied slaves, and provided that all persons who should neglect or refuse to be enrolled should be placed in the field service for the war. No substitutes were or could be accepted, for every person able to do military duty was himself already conscripted.



Very little resistance was made to this sweeping levy, for the Government of the Confederate States showed little mercy to opposition of any kind. Only through the conscription were the Southern armies filled for the last two years of the war, and its enforcement was so rigorous and inquisitorial that toward the end of the war the Confederacy generally had more men in the field than it could provide with arms.

*IV. Drafts in General.*—The liability of every able-bodied citizen of military age to do military duty, or to render its equivalent, has been imbedded in the constitutions of the various States, the reason being thus clearly stated in the New York constitution of 1777: "It is the duty of every man who enjoys the protection of society to be prepared and willing to defend it." By parity of reasoning, it would seem impossible, even in the absence of express stipulation on the subject, to deny the obligation of the citizen to be "prepared and willing to defend" the Federal Government, the national society, also, whose protection he enjoys, or the power of Congress, if necessary, to make military service compulsory.

The Constitution, however, has not left the matter in doubt or to construction; it has expressly given to Congress the power to "raise armies," without any restriction or limitation as to the manner or extent. Until 1863, nevertheless, the power to draft, with which the power to raise armies is pregnant, remained in abeyance, and its first exercise in 1863 marks strongly a great advance in the nationalization of the Government. In 1795 the military reliance of the country, outside of the regular army, was placed exclusively on the State forces of militia. In 1798 the authority given by Congress to the President to accept organizations of volunteers, and commission their officers, was widely censured as an infringement upon the militia rights of the States. In 1814 public opinion had advanced so far as to consent to

the employment of volunteers under national authority, but insisted that armies were to be "raised" only by voluntary enlistment, and resisted a draft even when disguised as an enrolment of the militia. In 1863 the General Government claimed and exercised the right to compel service *ad libitum* from the mass of its citizens, a power which Justice Story in 1833 did not suggest, and probably did not dream of.

And yet, when this power was first exercised in 1863-4, the constitutional arguments against it were surprisingly feeble. They were, in brief, that liability to compulsory military service was due, before the adoption of the Constitution, to the States; that it had not been granted to the Federal Government by the Constitution; and that it must, therefore, still be enforced, if at all, only by the States. Further arguments were drawn *ab inconvenienti*—from its possible absorption of State militia, and even of State civil officers, into the Federal service—but these we may pass over. On the other hand, the courts have steadily held that, as the Constitution has given to Congress the unlimited power to "raise armies," it has given therewith unlimited discretion of choice of the method by which armies shall be raised, whether by volunteering or by draft.

But, however sound may be the theory of conscription or draft in the United States, in practice it has always been found troublesome, irritating, and very barren of results compared with volunteering, because of inevitable exemptions, rejections, and desertions. In 1863, on an enrolment of 3,113,305 able-bodied citizens between eighteen and forty-five, it is doubtful if 100,000 conscripts were obtained for the army. The usual results of the draft are exemplified in one of Provost Marshal General Fry's periodical reports in 1864: *Number of drafted men examined*, 14,741. Number exempted for physical disability, 4374; number exempted for all other

causes, 2632; number paid commutation money, 5050; number who have furnished substitutes, 1416; total, 13,472. *Number held for personal service*, 1269. The results in substitutes and recruits must be still further diminished by the ultimate loss from desertion, which is not estimated here.

All the hardships of the system came with most crushing severity upon those least able to endure or to avoid them. But it must not be understood that the conscription law was therefore useless; on the contrary, as an assertion of the enormous reserve power of the Federal Government, and as a stimulus to the energy of States and individuals in encouraging volunteering, it was of the very greatest value. It is very evident that if the United States should ever again be compelled to maintain large armies, volunteering will still be the rule, and the draft power will only be held *in terrorem* to insure the prompt action of the States in filling their quotas.<sup>1</sup>

WEST VIRGINIA, a State of the American Union. Its organization had several peculiarities. Like Vermont, Kentucky, Maine, Texas, and California, it had no previous territorial existence; and, like Kentucky and Maine, it was formed from a part of a State already in existence. But in the cases of Kentucky and Maine the necessary consent of the Legislature of the parent State was so regularly given that no exception could be taken to it; while the existence of West Virginia is based upon a legal fiction by which Congress recognized a revolutionary loyal Legislature in Western Virginia as the legitimate Legislature of the State so far as to accept the consent of the former body to the erection of the new State of West Virginia.

There had long been a division of interests and feelings between that part of Virginia west of the Alleghanies

<sup>1</sup> See Convention, Hartford; War Power; Confederate States.

and the rest of the State. The former fraction, comprising nearly one half the territory of Virginia and about one fifth of her population (355,526 whites and 18,371 slaves), was rather a Northern than a Southern State in sympathy; its representatives in the Virginia convention opposed secession; and their constituents supplemented parliamentary by forcible opposition.

Early in May, 1861, a delegate convention at Wheeling declared the ordinance of secession null and void, and summoned a (Virginia) State convention. It met at Wheeling, June 11th, and two days afterward passed an ordinance vacating the State offices arrayed against the Federal Government. June 20th, it elected Frank Pierpont Governor of Virginia. July 2d, the Virginia legislature, elected under the convention's ordinance, met at Wheeling, and elected United States Senators, who were admitted by the Senate. August 20th, the convention passed an ordinance to create the State of Kanawha, and this was approved by popular vote, October 24th. At the same election delegates were chosen to a new convention, which framed the first constitution, now adopting the name of West Virginia. This constitution was ratified by popular vote, April 3, 1862, and in the following month the Legislature, representing the forty counties of Western Virginia, but claiming to represent the whole State, formally gave Virginia's consent to the erection of the new State. December 31, 1862, West Virginia was admitted by act of Congress, the admission to take effect on the adoption of gradual abolition by the new State<sup>1</sup>; and the State thus became a member of the Union, June 19, 1863.

The whole process of the formation of the State is a difficult problem in American constitutional law. It was evidently revolutionary in the main; but there are many features in it which go to support Sumner's "State

<sup>1</sup> See Abolition, III.

suicide'' theory.<sup>1</sup> After the downfall of the Rebellion Virginia admitted the validity of the formation by beginning suit in the Supreme Court against West Virginia for the restoration of Berkeley and Jefferson counties; but the suit was decided against Virginia in 1871.

*Constitutions.*—The first constitution was framed by a convention at Wheeling, November 26, 1861–Feb. 18, 1862. It provided that the State should “be and remain” one of the United States of America; that only white male citizens should vote; that the Senate should consist of eighteen members, chosen for two years, and the House of Delegates of forty-seven members, chosen for one year; that the membership of both houses should be reapportioned by the Legislature after each census; that the capital should be Wheeling until changed by the Legislature; that the governor should be chosen by popular vote for two years; that the judiciary should be elective; and that no slave should be brought into the State. The last feature was changed to a gradual abolition of slavery as above specified. This constitution also made an attempt to introduce the township system of government for local affairs; but the system was repugnant to the feelings of the people, and was abolished by the next constitution. May 24, 1866, an amendment was added disfranchising all persons who had voluntarily given aid and comfort to the Rebellion since June 1, 1861; and the provision of the constitution that no one could hold office unless entitled to vote made the amendment still more sweeping. The capital has since remained at Wheeling, except from April, 1870, until May, 1875, when it was located at Charleston. April 27, 1871, an amendment was ratified by popular vote, striking out the word “white” from the suffrage clause, and also the disfranchising amendment of 1866.

The present constitution was framed by a convention

<sup>1</sup> See Reconstruction.

at Charleston, January 16–April 9, 1872. Its principal changes were the increase of the Senate to twenty-four members, chosen for four years, and of the House to sixty-five members, chosen for two years; a prohibition of registration laws, and of special legislation in a number of specified cases; the increase of the governor's term to four years<sup>1</sup>; and the abolition of the township system.

*Boundaries.*—The boundaries of the State are not defined in the constitution, which only specifies the counties of Virginia included within it.

*Governors.*—Arthur J. Boreman, 1863–9; Wm. E. Stephenson, 1869–71; John J. Jacob, 1871–7; Henry M. Matthews, 1877–81; Jacob B. Jackson, 1881–5.

*Political History.*—Until 1870 the majority of the voters of the State were Republican, and its State officers even of that party. Even in 1860 the Republicans had contested two of the counties, and had given Lincoln a popular vote of 1929 in this part of the State. When war fairly began, the Republicans, under the name of “unconditional Union men,” took complete control of the new State. In 1864 Lincoln received nearly seventy per cent. of the total popular vote; and in 1868 Grant received nearly sixty per cent. But when the war ended, the return of disbanded Confederate soldiers, particularly in the southern and eastern parts of the State, introduced a troublesome complication into politics.

At first the dominant party met this by the disfranchising amendment of 1866, enforcing it by registration laws and test oaths, and suppressing resistance by force. The result was that in 1869 the number of disfranchised citizens was officially reported as 29,316, the number of actual voters being about fifty thousand; and as no disfranchised person could hold office, public business was seriously interfered with in many parts of the State.

<sup>1</sup> See also Riders, Veto.

The first sign of compromise was the "Flick Amendment," finally adopted in 1871. It was supported by moderate Republicans and Democrats, as it combined amnesty with negro suffrage, and in the struggle over it the Democrats, or "conservatives," carried the State and the Lower House of the Legislature in 1870, and the Senate in the following year. In 1872 Grant carried the State by a majority of 2264 out of a total vote of 62,366; but since that time the State has been so steadily Democratic that the Republicans almost ceased opposition until 1882, when they elected one of the State's four Congressmen. In 1882 the Legislature was composed as follows: Senate, twenty Democrats, three Republicans, one independent; House, forty-six Democrats, seventeen Republicans, two independents. Among the political leaders of the State have been the following: Arthur J. Boreman, Governor (Republican), 1863-9, and U. S. Senator, 1869-75; Wm. G. Brown, Democratic Congressman (from Virginia), 1845-9, and Unionist Congressman, 1861-5; J. U. Camden, Democratic candidate for Governor in 1868 and 1873, and U. S. Senator 1881-87; Allen T. Caperton, Whig member of the State Legislature, 1853-60, Confederate Senator, 1860-5, and U. S. Senator (Democrat) 1875-6; Henry G. Davis, Democratic U. S. Senator, 1871-8; Nathan Goff, Secretary of the Navy under Hayes, and Republican Congressman, 1883-5; Frank Hereford, Democratic Congressman, 1871-7 and U. S. Senator, 1877-81; John E. Kenna, Democratic Congressman, 1877-85; and Waitman T. Willey, Republican U. S. Senator (from Virginia) 1861-3, and (from West Virginia) 1863-71.

FOREIGN RELATIONS DURING THE CIVIL WAR.—The chief subjects touching foreign relations during the war were the *Trent* Affair and the *Alabama* Claims, in connection with Great Britain, and the intervention in Mexico,

in relation to France. On the latter topic see the Monroe Doctrine; Dana's edition of Wheaton's *International Law*; the *Diplomatic Correspondence of Seward*, and other references under the Monroe Doctrine. Seward's treatment of the attempt of the Confederate Government to negotiate; his circular letter to our representatives abroad; England's early recognition of Southern belligerency; the problem of the blockade and the closing of the Southern ports of entry; Davis's letters of marque and reprisal, and the depredations of Southern privateers will be found fully treated of by the various authorities cited.

*The "Trent" Affair.*—In the autumn of 1861 the government of the Confederate States (see that title) sent J. M. Mason and John Slidell as commissioners to Great Britain and France respectively. They ran the blockade to Havana, and there embarked on an English merchant steamer, the *Trent*, for St. Thomas, on their way to England. About noon of November 8th the vessel was stopped in the old Bahama channel by the United States steamer *San Jacinto*, Captain Wilkes, and the commissioners were taken out of her and transferred to Fort Warren, in Boston harbor, as prisoners.

Captain Wilkes's act was warmly approved by the people of the United States; but he had nevertheless transgressed the neutral rights for which the United States had always contended, and he had undertaken to put in force the right of visitation and search which the United States had found insufferable when it was claimed by Great Britain.<sup>1</sup> The United States Government therefore disavowed his action, and surrendered the prisoners to Great Britain. There was, however, a residuum of American ill-feeling toward Great Britain because of the British Government's officious preparations for an improbable war. Before giving the United States any

<sup>1</sup> See Embargo.



opportunity for explanation or disavowal, the British ministry prepared troops and transportation for Canada, forbade by proclamation the exportation of arms and munitions of war, and instructed Lord Lyons, its Minister at Washington, to withdraw from the United States unless the prisoners were set at liberty and an apology tendered within a time "not exceeding seven days."

"Mr. Seward took the ground that we had the right to detain the British vessel and to search for contraband persons and dispatches, and moreover that the persons named and their dispatches were contraband. But he found good reason for surrendering the Confederate envoys in the fact that Captain Wilkes had neglected to bring the *Trent* into a Prize Court and to submit the whole transaction to judicial examination. Mr. Seward certainly strained the argument of Mr. Madison as Secretary of State in 1804 to a most extraordinary degree when he apparently made it cover the ground that we would quietly have submitted to British right of search if the 'Floating Judgment-seat' could have been substituted by a British Prize Court. The seizure of the *Trent* would not have been made more acceptable to the English Government by transferring her to the jurisdiction of an American Prize Court, unless indeed that Court should have decided, as it most probably would have decided, that the seizure was illegal. . . .

"It is with no disposition to detract from the great service rendered by Mr. Seward that a dissent is expressed from the ground upon which he placed the surrender of Mason and Slidell. It is not believed that the doctrine announced by Mr. Seward can be maintained on sound principles of International Law, while it is certainly in conflict with the practice which the United States had sought to establish from the foundation of the Government. The restoration of the envoys on any such apparently insufficient basis did not avoid the mortification of the surrender; it only deprived us of the fuller credit and advantage which we might have secured from the act. It is to be regretted that we did not place the restoration

of the prisoners upon franker and truer grounds, viz., that their seizure was in violation of the principles which we had steadily and resolutely maintained—principles which we would not abandon either for a temporary advantage or to save the wounding of our national pride. . . .

“The luminous speech of Mr. Sumner, when the papers in the *Trent* case were submitted to Congress, stated the ground for which the United States had always contended with admirable precision. We could not have refused to surrender Mason and Slidell without trampling upon our own principles and disregarding the many precedents we had sought to establish. But it must not be forgotten that the sword of precedent cut both ways. It was as absolutely against the peremptory demand of England for the surrender of the prisoners as it was against the United States for the seizure of them. Whatever wrong was inflicted on the British flag by the action of Captain Wilkes had been time and again inflicted on the American flag by officers of the English navy,—without cause, without redress, without apology. Hundreds and thousands of American citizens had in time of peace been taken by British cruisers from the decks of American vessels and violently impressed into the naval service of that country.”<sup>1</sup>

“*Alabama*” *Claims*.—April 16, 1856, the representatives of Great Britain, Austria, France, Russia, Prussia, and Turkey, assembled in Congress at Paris, adopted the following declaration, to which nearly all other civilized nations afterwards acceded: 1st. Privateering is and remains abolished. 2d. The neutral flag covers enemy’s goods, with the exception of contraband of war. 3d. Neutral goods, with the exception of contraband of war, are not liable to capture under enemy’s flag. 4th. Blockades, in order to be binding, must be effective; that is to say, maintained by forces sufficient really to prevent access to the coast of the country. To this Declaration of Paris the United States refused to accede, being unwilling, by abolishing privateering, while other nations

<sup>1</sup> Blaine, *Twenty Years of Congress*, vol. i., pp. 584–586.

maintained enormous fleets, to accept the necessity of keeping up a large fleet in self-defence; but the President offered, July 29, 1856, to go further and adopt an additional article which should entirely exempt private property, even of citizens of belligerents, from capture on the sea, either by privateers or national vessels. Great Britain refused to agree to this, and the negotiation failed. The United States was therefore, in 1861, the only commercial nation not committed to the abolition of privateering.

The fall of Fort Sumter, in April, 1861,<sup>1</sup> was followed by a series of retaliatory measures, to which the use of the telegraph gave an extraordinary swiftness of succession. On the 15th of that month the President, by proclamation, announced the existence of the Rebellion, and called for volunteers to suppress it; on the 17th Jefferson Davis offered letters of marque and reprisal, against the commerce of the United States, to private armed vessels, and privateers at once began to issue from Southern ports; and on the 19th, by proclamation, the President declared a partial blockade of the Southern ports, which was made general on the 27th.

On the 24th Secretary Seward applied to the powers which had made the Declaration of Paris for permission to accede to it without qualification. To this Great Britain, acting in unison with France, consented, on condition that the engagement should not "have any bearing, direct or indirect, on the internal differences now prevailing in the United States." As this seemed to imply that the *de facto* government of the Southern Confederacy should still be allowed to keep privateers afloat, the United States declined to accept it and allowed this negotiation to drop, with the following concluding notation, May 21st: "Great Britain has but to wait a few months, and all her present inconveniences will cease with all our own troubles. If she take a different course

<sup>1</sup> See Rebellion.

she will calculate for herself the ultimate as well as the immediate consequences."

In the meantime the Queen's proclamation of May 13th had announced her neutrality between the United States and the Confederate States, had forbidden her citizens to take part with either, and had ordered her official servants to accord belligerent rights to both. This included the refusal of warlike equipments to the vessels of both parties, the preservation of the peace between their vessels in British harbors, and the detention of a war vessel of either for twenty-four hours after a hostile vessel had left the port.

Under this proclamation the position of Great Britain was difficult at the best, because of the great number and extent of her colonies in every part of the world, for whose action she was responsible; but the active, notorious, and undisguised sympathy of many of her colonial officers and citizens for the Rebellion and its cruisers contributed very largely to the difficulties of the home government and to the subsequent American demands upon it for damages. While the rule prohibiting the obtaining, in British harbors, of warlike equipments, and particularly of coal except within certain limits, was stringently enforced against Federal vessels, Confederate privateers generally found little difficulty in evading it by the connivance of colonial officials; and several colonial harbors, particularly that of Nassau, became depots of supplies for this species of vessel, to which they resorted to prepare for new voyages of destruction.

However impartial the treatment of belligerent vessels may have been in the ports of Great Britain, in the ports of British colonies United States war vessels found a neutrality so rigorous in its exactions as to be, in contrast with the open or hidden privileges accorded to rebel cruisers, fully tantamount to unfriendliness. They were frequently denied the privilege of taking coal on board

which had been left on deposit in British harbors by the United States Government, while rebel privateers, though without a port of their own, found no great difficulty in obtaining in British harbors the same "article of warlike equipment," without which they could not have kept the sea a single month.

On these grounds the American Minister to Great Britain, C. F. Adams, repeatedly warned the British Government that the United States had a fair claim for compensation for the damage done to its commerce; and this was subsequently enlarged by the claim that the Queen's proclamation of May 13th was itself issued precipitately and in violation of treaties, and that it gave possibility to rebel depredations which would have been impossible without it. It is but fair to add that the proclamation was defended by the Queen's ministers on the ground that rebel privateers were already upon the sea, and that it was necessary to free British officers who should meet them from the necessity of treating them as pirates.

The British foreign enlistment act of July 3, 1819 (59 Geo. III. cap. 69), prohibits under penalties, and empowers the government to prevent the equipment of any land or sea forces within the British dominions to operate against the territory or commerce of a friendly nation. In the United States the act of April 20, 1818, which is closely similar in its terms, preceded it, and the two governments are supposed to have acted with a common understanding in the matter.

During the Crimean War the United States had fulfilled their obligations promptly and fully by seizing and detaining vessels represented to be destined for the service of Russia; and the claim was now advanced, and finally established,<sup>1</sup> that Great Britain did not correspondingly exercise "due diligence" to fulfil its obligations. The

<sup>1</sup> See Geneva Award.

first privateers, during the year 1861, were equipped in Southern ports, and gained the open sea by running the blockade. When the most formidable of these, the *Sumter*, was hopelessly blocked up in Gibraltar by the U. S. steamer *Tuscarora*, and had to be sold in January, 1862, the Confederate agents in Great Britain at once began the construction of armed vessels there, evading the provisions of the enlistment act by fictitious ownership.

From February 18 until March 22, 1862, Minister Adams represented to the British Government that a war vessel then building by the Messrs. Miller, of Liverpool, the *Oreto* (afterward the *Florida*), though nominally destined for Palermo, in Sicily, was evidently and notoriously intended for war against the United States. As she contained no arms or munitions of war, she was allowed to sail, and proceeded to Green Bay, near Nassau, where she enlisted additional men, and was transformed into a Confederate privateer, arms and munitions having been brought from Great Britain in another vessel. The *Florida* was seized by a British steamer, the *Greyhound*, at Nassau, but released; and the British Government refused to satisfy the demands of the United States that the vessel should be seized as a violator of the enlistment act whenever she should come within British jurisdiction.

Soon after the departure of the *Oreto*, or *Florida*, Minister Adams began collecting evidence against another vessel then building by the Messrs. Laird at Birkenhead, near Liverpool, and called, from the number of merchants who had subscribed the expense of her construction, the *290* (afterward the *Alabama*). June 23d, he gave notice to Earl Russell of what he believed to be the real character of the vessel, and solicited "such action as might tend either to stop the projected expedition, or to establish the fact that its purpose was not inimical to the

people of the United States." That action was never taken. July 16th, the American Minister submitted to Earl Russell his evidence, and the opinion of distinguished English counsel that "the evidence was almost conclusive." A week afterward, July 23d, he offered fresh evidence, and a most emphatic opinion of the same counsel, to the following effect:

I have perused the above affidavits, and I am of opinion that the collector of customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her, and that if, after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility—a responsibility of which the board of customs, under whose direction he appears to be acting, must take their share. It appears difficult to make out a stronger case of infringement of the foreign enlistment act, which, if not enforced on this occasion, is little better than a dead letter. It well deserves consideration whether, if the vessel be allowed to escape, the Federal Government would not have serious grounds of remonstrance."

The vessel *was* allowed to escape. The board of customs referred the papers to their counsel; the Queen's advocate, Sir John D. Harding, fell ill; other counsel were called in, who advised the seizure of the vessel; but, before this opinion could be acted upon, the *Alabama* had sailed, July 29th, without register or clearance, to the Terceira, one of the Azores, where she took her equipment from two British vessels and became a Confederate war vessel, commissioned "to sink, burn, and destroy" the commerce of the United States. No effective pursuit of the vessel was made by Great Britain, and she was hospitably received, without any attempt to arrest her, in several British colonies afterward.

In April, 1863, the *Japan*, afterward called the *Georgia*,

left Greenock, and soon after, upon the coast of France, she took an equipment from another steamer and became a Confederate cruiser. For over a year she continued her cruise until she was captured off Lisbon, August 15, 1864, by the United States steamer *Niagara*, after a transfer to a Liverpool merchant.

In September, 1864, the steamer *Sea King*, owned by a Liverpool merchant, cleared at London for India. At Madeira she met another vessel, the *Laurel*, of Liverpool, from which she received her armament and men, and she then became the Confederate war vessel *Shenandoah*. During her career as a cruiser, before her surrender to the British Government, November 6, 1865, the *Shenandoah* took in supplies and enlisted men at Melbourne, Australia, with the connivance, as the American consul asserted, of the British authorities at that port.

Besides the devastation wrought by the rebel cruisers, the United States considered the toleration by Great Britain of Confederate administrative bureaus on British soil, by means of which alone offensive operations against American commerce were possible, as ground of reclamation. The action of the British Government in maintaining an official union with France upon questions growing out of the Rebellion, was also considered unfriendly to the United States in the absence of any recognition of the Confederate States as an independent nation. The whole mass of grievances of which the United States expected satisfaction from Great Britain, and to which the name "*Alabama Claims*" was commonly given, may best be summed up in the words of the American members of the joint high commission:

" Extensive direct losses in the capture and destruction of a large number of vessels, with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers; and indirect injury in the transfer of a large part of the American



commercial marine to the British flag, in the enhanced payment of insurance, in the prolongation of the war, and in the addition of a large sum to the cost of the war and the suppression of the Rebellion."

When it first became apparent that the neutrality of Great Britain would be a source of danger to the United States, Minister Adams was very active in pressing each fresh violation of neutrality upon the attention of the British Government, not, as he explained to his own Government, with any hope of obtaining more stringent laws, or greater diligence in the execution of existing laws, but with the intention of "making a record" to which the United States could thereafter appeal. The American ill-feeling toward Great Britain, which was developed by her haste to accord belligerent rights to the Confederacy, had grown upon every new grievance until, when the Rebellion was at last suppressed, it had settled into a dangerous disposition to leave the matter unsettled for the purpose of applying the British system of neutrality to British commerce in the event of any future war or rebellion against Great Britain.

The American Government, however, did not share this disposition. It continued to press its claim for compensation in the higher tone which was justified by its altered circumstances, but at the same time, January 12, 1866, offered to submit "the whole controversy" to arbitration. The British Government offered to accept an arbitration limited to the depredations of the *Alabama* and similar vessels, but this was declined by the United States for the reason that it involved a waiver of the position, which they had always held, that the Queen's proclamation of 1861, which accorded belligerent rights to insurgents against the authority of the United States, was not justified on any grounds, either of necessity or of moral right, and therefore was an act of wrongful in-

tervention, a departure from the obligations of existing treaties, and without the sanction of the law of nations.

January 14, 1869, Reverdy Johnson, American Minister to Great Britain, arranged a treaty which, without mentioning the *Alabama* claims in particular, provided for the submission to arbitration of "all claims" of either country against the other since February 8, 1853. In the Senate this treaty had but a single vote in its favor, and was not ratified. Negotiations on this subject then practically came to a stand until January 26, 1871, when the British Government proposed the appointment of a joint commission to sit at Washington and arrange the terms of a treaty to cover the disputes as to the Canadian fisheries and other questions at issue between the United States and Canada. The proposition was accepted on condition that the treaty should also make some disposition of the *Alabama* claims. To this condition Great Britain agreed, and five high commissioners from each country met in joint session at Washington, February 27, 1871. After thirty-four meetings, the commission agreed upon the terms of the *Treaty of Washington*, which was signed by the commissioners May 8th, ratified by the Senate, by a vote of 50 to 12, May 24th, ratified by Great Britain, June 17th, and proclaimed in force July 4, 1871, by President Grant. It provided for arbitration (1) as to the *Alabama* claims, (2) as to claims of British subjects against the United States, (3) as to the fisheries, and (4) as to the northwest boundary of the United States. The arbitrators upon the *Alabama* claims were to be five in number, appointed by the President of the United States, her Britannic Majesty, the King of Italy, the President of the Swiss confederation, and the Emperor of Brazil; and were to hold their sessions at Geneva, Switzerland.<sup>1</sup>

<sup>1</sup> For the constitution and award of the tribunal of arbitration, and the provisions of the treaty governing its deliberations, see Geneva Award.

On Emancipation Proclamation see 2 Greeley's *American Conflict*, 249; Appleton's *Annual Cyclopædia*, 1863, 834; 2 A. H. Stephens's *War Between the States*, 550; Harris's *Political Conflict in America*, 333; Pollard's *Life of Davis*, 477; Schuckers's *Life of S. P. Chase*, 441, 453; McPherson's *History of the Rebellion*, 220; *North American Review*, February and August, 1880; Burgess's *Civil War and the Constitution*; Rhodes's *U. S. History*; Blaine's *Twenty Years*; Schouler, vol. vi.; Smith's *Political History of Slavery*; Hay and Nicolay's *Lincoln*; authorities under Abolition, War Powers, and Rebellion. The text of the two proclamations is in 12 *Stat. at Large*, 1267, 1268. See also 13 Wallace's *Reports*, 654; 16 Wallace's *Reports*, 68; 18 Wallace's *Reports*, 546; 92 *U. S. Reports*, 542; 20 *La. Ann. Reports*, 199; 43 *Ala. Reports*, 592.

On Habeas Corpus see 3 Blackstone's *Commentaries*, 128 (original paging); Bacon's *Abridgment* ("Habeas Corpus"); 1 Howell's *State Trials*, pref., xxvi.; 20 *ib.*, addenda, 1374; 6 *ib.*, 1189; 2 Kent's *Commentaries* (4th edit.), 25; Story's *Commentaries*, (edit. 1833), § 1332; Burnet's *History of His Own Time* (edit. 1838), 321; Hurd *On Habeas Corpus*; a copious bibliography of the writ, its history and practice, up to 1842, is in 3 Hill's *Reports*, 647; the most interesting precedents are collected in Garfield's argument in the Milligan Case, 4 Wallace's *Reports*, 44; 2 B. R. Curtis's *Works*, 317; Whiting's *War Powers* (10th edit.), 161; E. Ingersoll's *History and Law of the Writ of Habeas Corpus, and Personal Liberty and Martial Law*; Breck's *Habeas Corpus and Martial Law*; *North American Review*, October, 1861; *Habeas Corpus Pamphlets of 1862* (particularly H. Binney's *Privilege of the Writ of Habeas Corpus*, and G. M. Wharton's *Remarks thereon*); Cooley's *Constitutional Limitations*, 344. II. 4 Cranch, 75; 12 Wheat., 19; 1 *Stat. at Large*, 73 (the act of September 24, 1789); 4 *ib.*, 634 (the act of March 2, 1833);

5 *ib.*, 539 (the act of August 29, 1842); 12 *ib.*, 755 (the act of March 3, 1863); 17 *ib.*, 13 (the act of April 20, 1871). III. 2 Parton's *Life of Jackson*, 306; 5 Hildreth's *United States*, 626; 3 Benton's *Debates of Congress*, 490, 504; 21 *How.*, 506; Tyler's *Life of Taney*, 420, 461, 640; *Taney*, 246; Burnham's *Memoirs of the Secret Service*; Baker's *History of the Secret Service*; Marshall's *American Bastile*; Sangster's *Bastiles of the North*; Howard's *Fourteen Months in an American Bastile*; Mahoney's *Prisoner of State*; Thavin's *Arbitrary Arrests in the South*; Lester and Brownell's *Confederate States Military Laws* (1864); *Reports of the Provost Marshal General*; Pollard's *Life of Davis*, 327; Pittman's *Indianapolis Treason Trials* (1865); *ex parte* Milligan, 4 *Wallace*, 107 (majority opinion); 132 (dissenting opinion); *Circulars of the Provost Marshal General*, May 15, 1863–March 27, 1865.

See (I.) 1 Schouler's *United States*, 130; Dwight's *Hartford Convention*, 247, 318; 6 Hildreth's *United States*, 529; 2 Ingersoll's *Second War with Great Britain*, 270; Carey's *Olive Branch*, 378; 3 Spencer's *United States*, 262; the act of Feb. 28, 1795, is in 1 *Stat. at Large*, 424, and see also 12 *Wheat.*, 19. (II.) McPherson's *History of the Rebellion*, 261; Appleton's *Annual Cyclopædia*, 1863–4; D. M. Barnes's *Draft Riots in New York*; Baker's *History of the Secret Service*; 4 Victor's *History of the Rebellion*, 124; the acts of March 3, 1863, Feb. 24, and July 4, 1864, are in 12 *Stat. at Large*, 731, 13 *Stat. at Large*, 6, 379. (III.) Pollard's *Life of Davis*, 325; 16 *Gratt. (Va.)*, 443, 470; 34 *Geo.*, 22, 85; 38 *Ala.*, 457; 39 *Ala.*, 475, 609. (IV.) law authorities under Congress, Powers of, VIII.; Whiting's *War Powers* (10th edit.), 205; 1 Hough's *New York Convention Manual of 1867*, 33; Story's *Commentaries*, §§ 1173, 1202; Tiffany's *Constitutional Law*, § 430.

On West Virginia see 2 Poore's *Federal and State Constitutions*; 2 Hough's *American Constitutions*; 3 Wilson's

*Slave Power*, 142; 2 Draper's *Civil War in America*, 241; *Tribune Almanac*, 1861-62; Appleton's *Annual Cyclopædia*, 1861-82; Burgess's *Civil War and the Constitution*; Blaine's *Twenty Years of Congress*; Rhodes's *History of the United States*.

On *Trent* Affair see *Diplomatic Correspondence* for 1861-2, and authorities under Rebellion, as 2 Draper's *Civil War*, 540; 2 Blaine's *Twenty Years*; Rhodes's *U. S. History*; Schouler, vol. vi.; Thomas L. Harris's *The "Trent" Affair*; Sumner's *Speech on the "Trent" Affair*.

On *Alabama* claims see *The Case of the United States to be Laid before the Tribunal of Arbitration to be Convened at Geneva*, London, 1872; *Case Presented on the Part of Her Britannic Majesty to the Tribunal of Arbitration*, London, 1872; *Official Correspondence on the Claims in Respect to the "Alabama,"* London, 1867; Bluntschli, *Opinion impartiale sur la question de la Alabama*, Berlin, 1870; Geffcken, *Die Alabamafrage*, Stuttgart, 1872; *Diplomatic Correspondence of the United States* (with messages), 1861-71; Cushing's *Treaty of Washington*. The act of April 20, 1818, is in 3 *Stat. at Large*, 448. The treaty is in *Stat. at Large*.

## CHAPTER XIV

### RECONSTRUCTION—PART I

**R**ECONSTRUCTION embraces the political problem of the restoration of the seceding States to their normal relations with the Union after the suppression of armed resistance therein to the Constitution and the laws. Such a problem would have been easy of solution under a simple and direct acting government; in a highly complicated system like that of the United States, in which the parts and their action are so delicately adjusted, any derangement shows its effects everywhere; and a derangement so great as was introduced by secession, since it cannot check the national force, is almost certain to throw all the wheels out of gear, convert the national machine into a blind and guideless power, and make a bad master out of a good servant. In the matter of reconstruction the difficulty was increased:

1. By the length and bitterness of the war. The terms of reconstruction which were possible in 1862, 1863, 1864, or 1865, were each of them impossible within a year thereafter. Every battle lost and won, every vessel sunk, every house burned, every case of mistreatment of prisoners, was in its way a factor not only in anti-slavery action, but in final reconstruction.

2. By the status of the freedmen. It was impossible that the successful party should feel no interest whatever in the fate of the beings who had been converted by its success from chattels into persons. It was natural that

the disposition of the conquered toward the freedmen should be keenly and suspiciously scrutinized; and thus every act of individual violence, every appearance of organized repression, which came to light before the work of reconstruction was completed, became a silent factor in the work.

3. By the existence of a written constitution which provided for no such state of affairs. An omnipotent British Parliament would have soon hit on a formal settlement, though its success in solving the Irish problem has not been so swift or sure as to make us wish for a change of *régime*. The American Government could only engage in a series of experiments, more or less successful, and finally rest content with that solution which seemed to offer the least difficulty and the greatest advantages to the nation. "Happily for the nation," says Brownson, "few blunders are committed that with our young life and elasticity are irreparable, and that are greater than are ordinarily committed by older and more experienced nations. They are not of the most fatal character, and need excite no serious alarm for the future."

In considering the question, it is proposed, 1, to give, as briefly as possible, the successive theories of reconstruction; 2, to detail the work as it was finally done; and 3, 4, to consider its failures and its successes. In so doing, there are certain precedents which are often referred to by all parties, and these may as well be given now, for reference.

*The Guarantee Clause.*—The Constitution (Art. IV., § 4) speaks as follows: "The United States shall guarantee to every State in this Union a republican form of government."

To this was often added the following paragraph from the powers of Congress (Art. I., § 8): "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers

vested by this Constitution in the Government of the United States or in any department or officer thereof." This, it was claimed, gave Congress power to pass all laws which it should consider "necessary and proper" for carrying into effect the guarantee clause. This would have been undeniable if the language of the clause had been "Congress shall guarantee," or "the Government shall guarantee"; or even any "department or officer shall guarantee"; but the peculiar phraseology, "the United States shall guarantee," seems to exclude all these interpretations, and give the power concurrently to all the governmental agents, executive, legislative, and judicial. Even in this view, however, the case of *Luther vs. Borden* would seem to show that Congress has the power to enact laws to carry into execution its concurrent power in the premises, and that the President is bound to execute them.

*The Resolutions of 1861.*—At the special session of 1861 joint resolutions were introduced to define the objects of the war. That which was pertinent to this subject was as follows:

" . . . That this war is not prosecuted upon our part in any spirit of oppression, nor for any purpose of conquest or subjugation, nor for the purpose of overthrowing or interfering with the rights or established institutions of those States, but to defend and maintain the supremacy of the Constitution and all laws made in pursuance thereof, and to preserve the Union with all the dignity, equality, and rights of the several States unimpaired; that as soon as these objects are accomplished, the war ought to cease."

It passed the House, July 22, 1861, 117 to 2; and the Senate, July 26, 30 to 5.

*The Law of 1861.*—The act of July 13, 1861, authorized the President, when he should have called out the militia against insurgents claiming, without dispute, to "act



under the authority of any State or States," to proclaim the inhabitants of the insurgent States to be in insurrection against the United States; and ordered commercial intercourse with the insurgent States to cease. Accordingly the President issued a proclamation, August 16th, declaring the inhabitants of Georgia, South Carolina, Virginia (except those west of the Alleghanies), North Carolina, Tennessee, Alabama, Louisiana, Texas, Arkansas, Mississippi, and Florida, to be in insurrection.

For the blockade of 1861, see *Alabama Claims*.

I. THEORIES OF RECONSTRUCTION.—As a summary of the changes of theory, we may say that the war was begun under the theory of "restoration," and that this theory was persistently maintained by the Democrats to the end; that the presidential theory was developed by Lincoln in 1863, and carried out by Johnson in 1865, but fell back under the hands of the latter into a modification of the restoration theory; that the Sumner and Stevens theories received no formal ratification from any quarter; but that Congress, having advanced so far as the Davis-Wade plan of 1864, was pressed by the force of contest with the presidential theory into a plan of its own in 1867, consisting of the Davis-Wade plan, increased by the suffrage features of the Sumner theory, and the whole based on a modification of the Stevens theory of the suspension of the Constitution.

1. *Restoration*.—The war began under the influence of the idea that there was "not one of these States in which there were not ample numbers of Union men to maintain a State government after the Rebellion shall have been put down." There were some warnings to the contrary.

"It may be," said Baker, of Oregon, in the Senate, "that instead of finding, within a year, loyal States sending members to Congress and replacing their Senators upon this floor, we may have to reduce them to the condition of Territories,

and send from Massachusetts and Illinois governors to control them; and, if there were need to do so, I would risk even the stigma of being despotic and oppressive rather than risk the perpetuity of the Union of these States.”

But such warnings were unheeded, and the general feeling was well represented by the resolutions of 1861. The actual shock of war, and the evidently universal transfer of allegiance in the South to the Confederate States (see that title), at once worked a change. In December, 1861, the resolutions of July were again offered in the House, but were laid on the table by a vote of 71 to 65. The same result with increasing majorities met subsequent reintroductions of the resolutions. In December, 1862, these resolutions took another shape, that of a simple declaration that the war was prosecuted only to maintain the integrity of the Union and of the States as they were at the beginning of the war. In this form they were ruled out of order, or laid on the table, by majorities small at first but steadily increasing. They owed their defeat mainly to the fact that they squinted at slavery and the admission of West Virginia: if confined to the question of restoration, they could as yet hardly have been defeated. Even Vallandigham's resolutions, long, cumbrous, and containing the invidious word “professedly” in reference to the original object of the war, were only defeated by a vote of 79 to 50. Generally, however, Democratic members hardly felt it to be necessary to defend their position vigorously until reconstruction began to loom up plainly in 1863-4. Pendleton's statement of Democratic views may then be taken as authoritative.

“These acts of secession were either valid or invalid. If they are valid, they separated the State from the Union. If they are invalid, they are void; they have no effect; the State

officers who act upon them are rebels to the Federal Government; the States are not destroyed; their constitutions are not abrogated; their officers are committing illegal acts, for which they are liable to punishment; the States have never left the Union, but so soon as their officers shall perform their duties, or other officers shall assume their places, will again perform the duties imposed, and enjoy the privileges conferred, by the Federal compact, and this, not by virtue of a new ratification of the Constitution, nor a new admission by the Federal Government, but by virtue of the original ratification, and the constant, uninterrupted maintenance of position in the Federal Union since that date. Acts of secession are not invalid to destroy the Union, and yet valid to destroy the State governments and the political privileges of their citizens."

This ground was held thereafter by the Democratic conventions of all the States, and by the national convention of 1868, but it was unsuccessful. Indeed, it was worse. Nothing is more curious in the congressional votes on this question than the manner in which Democratic consistency and persistency thwarted all propositions for mild terms to the insurrectionary States. The names of Democrats and "radical" Republicans, of Fernando Wood and Thaddeus Stevens, appear side by side in voting down the successive and increasingly severe propositions for reconstruction, until, after 1865, the "radical" Republicans, falling back a step, united with the moderate Republicans and swamped the Democrats.

Kindred to this general principle were the constant demands of the Democrats for a national convention of States. They began July 15, 1861, when Benjamin Wood, of New York, offered a resolution recommending such a convention, which was tabled by a party vote of 92 to 51; and they continued until the Democratic national convention of 1864 demanded "a cessation of hostilities with a view to an ultimate convention of all the States." Toward the end of the war, and particularly

just before the presidential election of 1864, many Southern authorities inclined to accept this scheme, if offered to the seceding States; but they still insisted that the States were not to be bound by the action of the convention.

Another kindred proposition, offered in December, 1861, and several times thereafter, was to appoint ex-Presidents Fillmore and Pierce, Chief Justice Taney, Edward Everett, and seven other commissioners, to confer with a like number from the seceding States for the preservation of the Union. It was either left unconsidered or tabled.

In the conference at Hampton Roads, February 2, 1865, between Alex. H. Stephens, R. M. T. Hunter, John A. Campbell, President Lincoln, and Secretary Seward, Mr. Stevens says that he asked

“ what position the Confederate States would occupy toward the others, if they were then to abandon the war? Would they be admitted to Congress? Mr. Lincoln very promptly replied that his own individual opinion was that they ought to be. He also thought they would be, but he could not enter into any stipulations upon the subject. His own opinion was, that when the resistance ceased and the national authority was recognized, the States would be immediately restored to their practical relations to the Union.”

This statement, however, is opposed to the known fact that the President was then fairly committed to the presidential theory of reconstruction.

The last attempt at “restoration” was the memorandum of April 18, 1865, between Generals W. T. Sherman and Joseph E. Johnston. It provided for the disbandment of the Confederate forces at their State capitals, the re-establishment of the Federal courts, and “the recognition by the executive of the United States of the

several State governments on their officers and legislatures taking the oath prescribed by the Constitution of the United States; and, where conflicting State governments have resulted from the war, the legitimacy of all shall be submitted to the Supreme Court of the United States." The agreement was repudiated by President Johnson, and an unconditional surrender took its place, April 26th.

2. *The Presidential Theory*.—President Lincoln seems to have held from the beginning, that while, as commander-in-chief, he was bound to carry the war into the heart of the seceding States, he was also bound, as civil executive, to endeavor to restore civil relations with the States themselves. His theory is detailed in his proclamation of December 8, 1863, and his defence of it in his annual message of the same date. The proclamation, 1, offered amnesty to all but specified classes of leading men; 2, declared that a State government might be reconstructed as soon as one tenth of the voters of 1860, qualified by State laws, "excluding all others," should take the prescribed oath<sup>1</sup>; 3, declared that, if such State government were republican in form, it should "receive the benefits" of the guarantee clause; 4, excepted States where loyal governments had always been maintained; but, 5, added the caution that the admission of Senators and Representatives was a matter exclusively "resting with the two Houses, and not to any extent with the Executive." The proclamation further remarked, that "any provision which may be adopted by such State government in relation to the freed people of such State, which shall recognize and declare their permanent freedom, provide for their education, and which may yet be consistent, as a temporary arrangement, with their present condition as a laboring, landless, homeless class, will not be objected to by the national Executive." The message says: "There must be a test by which to separate the

<sup>1</sup> See its form under Amnesty, I.

opposing elements, so as to build only from the sound, and that test is a sufficiently liberal one which accepts as sound whoever will make a sworn recantation of his former unsoundness." The presidential programme thus included but four points: cessation of resistance, the appointment of a provisional governor, the taking of the oath of amnesty by at least one tenth of the white voters, and the formation of a republican government; there was no negro suffrage or supervision by Congress in it, and the only action of Congress was to be the separate decision of the two Houses on the admission of members. It is impossible to see any difference between this and Johnson's "policy." The features are identical. Johnson always declared that they were the same, and in his speech of February 22, 1866, asserted that Lincoln had told him, a year before that time, that he was "pretty nearly or quite done with amendments to the Constitution," provided the Thirteenth Amendment were ratified. Seward and other intimate friends of President Lincoln maintained the identity of the systems. General Grant, in his testimony before the House Judiciary Committee, July 18, 1867, said that the first of Johnson's reconstruction proclamations (for North Carolina) was the same, and he thought the same *verbatim*, as one which had been read to him twice in a Cabinet meeting before Lincoln's assassination. We may safely take the two systems as identical, as the "presidential theory."

So long as slavery was not a point of attack, it is evident that restoration and the presidential theory were very much the same thing, the only new point in the latter being the exclusion of white voters unable or unwilling to take the oath. In this sense, Virginia was restored or reconstructed from the beginning: the Pierpont government was recognized by the President at first as the government of all Virginia, then of the conquered portion of Virginia proper (after the separation of West

Virginia), and at the close of the war it superseded the rebellious government of Virginia, without objection from any quarter. Nor did it lack congressional recognition, in both its aspects: Congress admitted West Virginia by virtue of the formal assent of the "Virginia government" of Pierpont; and the separate action of the two Houses, according to the presidential theory, was illustrated by the refusal of the House to admit Pierpont members after 1863, while the Pierpont Senators held their seats, one until 1865, and the other until his death, in 1864, when the Senate refused to admit his successor.

A new feature came in with the President's adoption of an anti-slavery policy, in September, 1862. Thereafter, the presidential theory included the abolition of slavery, and a recognition of the anti-slavery laws and proclamations in the amnesty oath. In other points, it remained the same: no legislation by Congress, and separate action of the Houses on the admission of members. In this way, Louisiana, Arkansas, and Tennessee were reconstructed, in 1863-5. The legality of these governments was always stoutly maintained by President Lincoln. In his proclamation of 1864, hereafter referred to, in regard to the Davis-Wade bill, he says that he is "also unprepared to declare that the free-State constitutions and governments already adopted and installed in Arkansas and Louisiana shall be set aside and held for naught, thereby repelling and discouraging, as to further effort, the loyal citizens who have set up the same."

The counter-proclamation of Davis and Wade alleged that an unsuccessful expedition into Florida had the same object, to organize a presidential government. However true that may be, the operation of the presidential theory, in its second aspect under Lincoln, stopped with Virginia, Arkansas, Louisiana, and Tennessee. Even these examples were fortified by the separate action of the Houses upon them: the Louisiana Representatives were

admitted in February, 1863, while the Senators were refused admission, as were the Representatives also after March 4, 1863; the Arkansas Senators and Representatives did not apply for admission until 1864, and then the temper of Congress had risen so high that they were refused; the admission of the Tennessee Senators and Representatives, in July, 1866, was, as is hereafter noted, the point where the congressional theory superseded its predecessor.

Congress adjourned, March 3, 1865, until December 4th following; Lincoln died April 15, 1865; and Johnson succeeded to his theory, with far inferior prospects of success. Precedents were in his favor, the admission of West Virginia, the presence of Senators from Virginia 1861-5, of Representatives from Virginia 1861-3, and of Representatives from Louisiana in 1863; he was supported by Lincoln's name and Cabinet; and, above all, he had a clear field for nine months before Congress could meet. Against him were his unfortunate temper, his inability to temporize, and his controlling sympathy with non-slaveholding Southerners. It was certain, that, at the first sign of failure in the presidential theory, popular opinion would strike at Johnson far more willingly than at Lincoln, and that Johnson was far less qualified than Lincoln to meet or evade the attack.

General Johnston surrendered April 26, 1865, and May 29th following, President Johnson began to put into operation the presidential theory, accompanying it with a new amnesty proclamation,<sup>1</sup> such a measure being an integral feature of the plan. In each State, the sequence of events was, 1, the appointment of a provisional governor; 2, the summoning of a convention, composed of, and voted for, by whites able to take the amnesty oath; 3, the adoption of a constitution, or ordinances, forbidding slavery, repealing or declaring null and void the

<sup>1</sup> See Amnesty, II.



ordinance of secession, prohibiting persons in the "excepted classes" from voting or holding office, and repudiating the rebel debt; 4, the ratification of these by popular vote; and 5, the election of legislatures, State governments, and members of Congress.

There seems to have been absolutely no check upon the action of the conventions, except the President's proclamations, and telegraphic information from him that their action seemed to him satisfactory, or the reverse.

Excluding the States (Virginia, Arkansas, Tennessee, and Louisiana) already reconstructed, there remained but seven States. In each of these, provisional governors were appointed as follows: North Carolina, Wm. W. Holden, May 29th; Mississippi, William L. Sharkey; June 13th; Texas, Andrew J. Hamilton, June 17th, Georgia, James Johnson, June 17th; Alabama, Lewis E. Parsons, June 21st; South Carolina, Benj. F. Perry, June 30th; Florida, William Marvin, July 13th.

The first proclamation of the series, as to North Carolina, may stand for all: its preamble recited that the United States guarantee to each State a republican form of government, that the President is bound to take care that the laws be faithfully executed, that the Rebellion had deprived the State of all civil government, and that it was now necessary and proper to carry out the guarantee of the United States to North Carolina. In Mississippi, Georgia, and South Carolina, the late governors attempted to convoke the legislatures, and anticipate reconstruction, but the attempts were promptly suppressed by the military commanders. The governments of Virginia, Louisiana, Arkansas, and Tennessee were left undisturbed. In all the others the work of reconstruction was so actively carried on during the summer and autumn of 1865, that, when Congress met in December, claimants for seats in the House and Senate were ready from all the seceding States, except Texas. The

work of reconstruction was then ended, so far as the presidential theory could carry it; and, as if to clinch and fasten it permanently, Secretary Seward issued his proclamation, December 18, 1865, announcing the ratification of the Thirteenth Amendment. In its adoption, the ratifications of the legislatures of the seceding States had been essential, and it seemed as if no one could now reject the presidential theory, without impugning the validity of the amendment.

3. *The Sumner Theory*.—Mr. Sumner offered a series of resolutions in the Senate, February 11, 1862, “declaratory of the relations between the United States and the territory once occupied by certain States.” The preamble recited the action of the several seceding States, through their governments, in abjuring their duties, renouncing their allegiance, levying war on the Government, and forming a new confederacy. The resolutions were nine in number, as follows: 1, that an ordinance of secession is inoperative and void against the Constitution, but is an abdication by the State of its rights under the Constitution, and thenceforward the State, *felo de se*, ceases to exist, and its soil becomes a territory, under the exclusive jurisdiction of Congress; 2, that secession is a usurpation, and action under it is without legal support; 3, that the suicide of a State puts an end to any peculiar institution upheld by the State’s sole authority; 4, that slavery is such an institution; 5, that it is the duty of Congress to put a practical as well as a legal end to slavery; 6, that any recognition of slavery is aid and comfort to the Rebellion; 7, that it is also a denial of the rights of persons who have been made free; 8, that, as the allegiance of all the inhabitants of the seceding States is still due to the United States, the protection of the United States is equally due to all the inhabitants, regardless of color, class, or previous condition of servitude; 9, that Congress will proceed to establish republican forms of government

in the "vacated territory," taking care to provide for the protection of *all* the inhabitants. The essence of the resolutions is the idea of "State suicide"; that no Territory can be compelled to assume, and no State can be compelled to retain, the public rights and duties of a State against its will; that, as Brownson expresses it, "a Territory by coming into the Union becomes a State, and a State by going out of the Union becomes a Territory." The resolutions were never formally considered or adopted; but their theory remained, and undoubtedly colored to some extent the final work of reconstruction.

4. *The Stevens Theory*.—From the outbreak of the Rebellion until the end of reconstruction but two parties consistently maintained a consistent theory, the Democratic party and Thaddeus Stevens. The Democratic theory has already been given. The Stevens theory may be briefly stated as the suspension of the Constitution in any part of the country in which resistance to its execution was too strong to be suppressed by peaceful methods. He held that the mere fact of resistance suspended the Constitution for the time; that it could not truly be said that the Constitution and laws were in force where they could not be enforced; that the termination of the suspension was to be decided by the victorious party; that if the Rebellion were successful, the suspension would evidently be permanent, and that if the Rebellion were suppressed, the suspension would continue until the law-making and war-making power should decide that the resistance had been honestly abandoned. Here the theory shaded into the indefinite "war-power." But it differed more than it agreed. Republicans generally held that armies were marching and battles were fought and States were reconstructed throughout the South by virtue of the Constitution and its war power, and they were forced to strain the written instrument into the most extraordinary

shapes, and to take lines of action which were radically contradictory. To cite a single example: unless the Pierpont government was the legal government of Virginia in 1861, West Virginia is not, and never has been, a State of the Union; and yet, if the Pierpont government was legal in time of war, its reconstruction by Congress in a time of profound peace was unwarranted by any law. But both these contradictions were accepted. West Virginia was retained as a State, and its members even voted on the reconstruction of the parent State of Virginia. All this, and countless other contradictions, were blotted out by Stevens's all-embracing theory. From it he never swerved. At the special session of July, 1861, he declared it as follows:

“These rebels, who have disregarded and set at defiance that instrument, are, by every rule of law, estopped from pleading it against our action. There must be a party in court to plead it; and that party, to be entitled to plead it, must first acknowledge its supremacy, or he has no business to be in court at all. Those who bring in this plea here, in bar of our action, are in a legal sense the advocates of rebels, their counsellors at law; they are speaking for them, not for us, who are the plaintiffs in the action. I deny that they have any right to plead at all. I deny that they have any standing in court.”

For this reason he voted for the admission of West Virginia, while he still considered the Richmond legislature the legislature of Virginia, and ridiculed unsparingly the action of “the highly respectable but very small number of the citizens of Virginia, the people of West Virginia,” who had “assembled together, disapproved the acts of Virginia, and with the utmost self-complacency called themselves Virginia.” In the same way he voted for every war measure without leaving any unpleasant precedents for the final work of reconstruction. Throughout

the war his views were always repudiated by Colfax and other leading Republicans, and he said in 1863:

“ I know perfectly well that I do not speak the sentiments of this side as a party. I know that, for the last fifteen years, I have always been a step ahead of the party I have acted with in these matters; but I have never been so far ahead but that the members of the party have overtaken me and gone ahead, and they will again overtake me before this rebellion is ended. They will find that they cannot execute the Constitution in the seceding States; that it is a total nullity there; and that this war must be carried on upon principles wholly independent of it.”

Even in the final process of reconstruction he took no step backward. In his theory the guarantee clause and the other constitutional grounds of congressional action had no place. Congress had omnipotent power, because the seceding States had repudiated the Constitution. If that body chose to offer mild terms, so much the better for the conquered; if harsh, no one had a right to complain. Democratic votes aided him in defeating the offer of any terms until his own party was so near him that he could rejoin it with the sacrifice of little in fact and nothing in theory. This result came about in December, 1865, when he became the leader of the joint committee of fifteen on the rebellious States; and from that time much of the work of reconstruction was his own, modified by the restraining influence of his colleagues. The fundamental condition of negro suffrage was one of his purposes, but he persistently advocated even harsher terms of peace. In a speech at Lancaster, Pa., in September, 1865, he proposed the confiscation of the estates of rebels worth more than \$10,000 or 200 acres of land, forty acres of land to be given to each freedman, and the balance, estimated at \$3,500,000,000, to go toward paying off the national debt. He supposed that only one tenth of the whites would lose their property, while

nearly all Southern property would be confiscated. This proposition was never formally considered, but it made Stevens the incarnation of all evil in the eyes of Southerners. His name and his purposes occur in the debates of all the Southern conventions of 1865, and are introduced as incentives to the prompt acceptance of the presidential policy.

5. *The Davis-Wade Plan.*—The adoption of an anti-slavery policy during the war made necessary the imposition of some condition on reconstruction; and this condition was first stated in the presidential plan of 1863, in the form of the oath to support the anti-slavery proclamations and laws, as well as the Constitution. But, if any such condition could be imposed, there was practically no limit in theory to the conditions which might be imposed: there was no middle ground between unconditional restoration and the discretion of the conquering government. The appearance of a condition in the presidential policy was therefore the signal for the appearance of a condition in Congress also. In the President's policy no security was asked for the faithful execution of reconstruction, beyond the taking of the oath, the oversight of the President, and the separate action of the Houses in admitting members. To fill this defect, a bill was privately drafted in 1863, reported to Congress by the Committee on Rebellious States, of which Henry Winter Davis and Benj. F. Wade were the leaders, and came fairly before the House, March 22, 1864. By its terms the President was to appoint provisional governors, who were to enroll the white citizens through the aid of United States marshals. When a majority of these citizens in any State should take the oath of allegiance, they were to hold a State convention, excluding from voting or being delegates all Confederate office-holders and all who had voluntarily borne arms against the United States. The constitution was to repudiate the rebel

debt, abolish slavery, and prohibit the higher military and civil office-holders of the State and Confederacy from voting for or serving as governors or members of the legislature. When this was done, the provisional governor was to notify the President; when the assent of Congress was obtained, the President was to recognize the new government by proclamation; and then Senators and Representatives were to be admitted. It declared forever free the slaves in seceding States, and made the holding of any such person in slavery an offence punishable by fine and imprisonment; but there was still no attempt to introduce negro suffrage. The bill was defended on the ground that

“we are now engaged in suppressing a military usurpation of the authority of State governments, and our success will be the overthrow of all semblance of government in the rebel States. The government of the United States will then be in fact the only government existing in those States, and it will be charged to guarantee them republican governments. When military opposition shall have been suppressed, not merely paralyzed, driven into a corner, and pushed back, but gone, then call upon the people to reorganize in their own way a republican government in the form that the people of the United States can agree to, subject to the conditions that we think essential to our permanent peace, and to prevent the revival hereafter of the Rebellion.”

Its basis was therefore the same as that of the final congressional plan: that of a war measure passed, if not *bello flagrante*, at least *bello non cessante*. Its advocates objected to the President's plan for the reason that the latter “proposed no guardianship of the United States over the reorganization of State governments, no law to prescribe who shall vote, no civil functionaries to see that the law is faithfully executed, no supervising authority to control and judge of the elections.”

These defects the Davis-Wade bill proposed to rectify by the introduction of the local machinery of marshals, and the final authority and assent or rejection of Congress. But who or what was to prevent reconstructed governments, after the admission of their Senators and Representatives, from amending their constitutions and eliminating the conditions of reconstruction? Here was the weak point of the bill, which Congress finally endeavored to strengthen in 1867 by negro suffrage and constitutional amendment.

The bill was passed by the House, May 4th, by a vote of 73 to 59, but did not come up in the Senate until July 1st. On the last day of the session it was passed by the Senate, but the President refused to sign it for the reason that he had not sufficient time to examine it. July 8, 1864, he issued a proclamation explaining and defending his reasons for not signing the bill. Messrs. Davis and Wade replied in a counter-proclamation "to the supporters of the Government." They had read the President's proclamation "without surprise, but not without indignation." They asserted, on the contrary, that the substance of this bill had been before the President for more than a year for consideration; that he himself had intrigued to delay the passage of the bill so as to obtain an excuse for refusing to sign it; that Senator Doolittle, of Wisconsin, had written to the Louisiana authorities that the House bill would be held as long as possible in the Senate, and finally killed by a pocket veto; that the President's persistence in his own plan, and his hostility to that of Congress, were both inspired by the desire to use, if necessary, the electoral votes of Louisiana and Arkansas to secure his own election in November, and that an abortive military expedition into Florida had the same object; and they ask, "if those votes turn the balance in his favor, is it to be supposed that his competitor, defeated by such means, will acquiesce?" In conclusion



they warn the President that their support "is of a cause, and not of a man; that the authority of Congress is paramount and must be respected; and that if he wishes their support, he must confine himself to his executive duties, to obey and execute, not make the laws, to suppress armed rebellion by arms, and leave political reorganization to Congress."

In the following session the bill was again introduced in the House, but it was already obsolete, and was laid on the table. Instead of it, the bill of 1865<sup>1</sup> forbade the counting of electoral votes from any of the seceding States, for the reason that their inhabitants had rebelled, and that the States were "in such condition" that no valid election could be held. The phrase quoted was a compromise between the views of those who wished to except Louisiana from the list of States excluded, and of those who wished to declare explicitly that all the States (including Louisiana, Arkansas, Tennessee, and Virginia) were "still in such state of rebellion" in November, 1864. Electoral votes were sent by Louisiana and Tennessee, but were rejected under the law. Thus the whole question was still left in suspension, and the war ended with no other preparation for reconstruction than the policy which Lincoln had inaugurated, and Johnson was to carry into general effect.

6. *The Congressional Plan.*—The acceptance of the presidential policy by the State conventions of Southern whites was so swift that Northern Democrats, before the end of July, 1865, generally supported the whole scheme as the best practical form of "restoration," taking the changes in State constitutions as the voluntary act of the States, not as conditions imposed by the President. The resolutions of successive State conventions of 1865 show constant change. Democratic resolutions grow steadily stronger in their approval of the presidential

<sup>1</sup> See Electors, V.

policy. Republican resolutions grow steadily more reserved in their approval of the President and his policy, and steadily stronger in their approval of "impartial suffrage" as a condition precedent to the reconstruction and recognition of seceding State governments. For this change in the Republican position, there was undoubtedly party reason. Stevens said frankly in 1867: "White Union men are in a minority in each of those States. With them the blacks would act in a body, form a majority, control the States, and protect themselves. It would insure the ascendancy of the Union party, and I believe, on my conscience, that on the continued ascendancy of that party depends the safety of this great nation." But this reason alone, however it might have controlled the policy of the party, could never have made that policy a success: it could never have carried as it did the elections of 1866, the very crisis of congressional reconstruction. The controlling reason will be found in the constant irritation kept up by the general cast of the legislation in regard to freedmen by the reconstructed legislatures of 1865-6, supplemented by the indiscreet, unconciliating, and inflammatory tone of the President himself.

In regard to marriage and testimony or standing in court, most of the Southern legislation was alike. Former slaves who had cohabited as man and wife were to be deemed and taken as married, but marriage between the two races was forbidden under penalties. Negroes were to sue and be sued like whites. The testimony of a negro was only to be received in cases where a negro should sue a white, where a white had injured a negro, or where the rights of a negro were in question, always provided that the testimony offered was essential to the case. Contracts between blacks and whites were to be void unless put in writing and witnessed by a white man. A benevolent exception should be noticed in the law of

Virginia, that contracts between blacks and whites were not to be binding *upon the black* unless put in writing before a magistrate and fully explained by him. The criminal laws were generally fair and equal, except that rape of a white woman by a negro was made punishable by death. In many minor points this species of legislation was no doubt objectionable. Taken as a whole, and considered as the work of men who had within a year been absolute masters of the freedmen, and who had been dispossessed of their control by war and conquest, it must be conceded that it exhibits remarkable self-control, public spirit, and equity.

The case was very different with the vagrancy and stay laws passed by most of the Southern legislatures. We have already noticed that the proclamation of 1863 made "no objection" to a temporary regulation of the status of the freedmen, "as a laboring, landless, homeless class."

On this subject the legislation of North Carolina, Tennessee, and Texas was comparatively unobjectionable.

The Virginia act declared all persons vagrants who refused to work for the wages common and usual in the place where they lived, or who broke a contract with an employer, and in the latter case authorized the employer to work the runaway an additional month, with ball and chain, if necessary. The act was revoked by General Terry, January 24, 1866, for the reason that combinations of employers were reducing wages below a fair rate, and then punishing as vagrants the laborers who refused to accept them.

The most comprehensive system was that of Mississippi, passed at various times during the last two weeks of November, 1865. Negroes who were orphans or unsupported were to be apprenticed until the ages of twenty-one for males and eighteen for females, and the masters were to have power to inflict "moderate corporal

chastisement," and to recapture fugitives. Negroes, or whites habitually associating with negroes, were declared vagrants if they had no lawful employment, or assembled themselves together unlawfully. They were to be arrested and fined, and, if unable to pay the fine, were to be hired out to the bidder who would pay the fine for the shortest term of service. The evidence of a "lawful employment" was to be the negro's written contract for labor, or his license from a mayor or police board to do job work. These, renewed annually, were to serve as a pass: without them the negro was a self-confessed vagrant. All the laws respecting crimes committed by "slaves, free negroes, or mulattoes" were re-enacted, and declared to be in full force and effect against "freedmen, free negroes, and mulattoes." Any negro who "carried arms without a license, committed riots, routs, affrays, trespasses, malicious mischiefs or cruel treatment to animals, seditious speeches, insulting gestures, language, or acts, or assaults on any person, or disturbance of the peace, or who exercised the functions of a minister of the gospel without a license from some regularly ordained church," was to be fined, and hired out if unable to pay. Any laborer who should break his contract, and leave his employer, was to be arrested and returned to his labor, and the expenses of the arrest were to be deducted from the runaway's wages. Any attempt to entice a contract laborer from his employer was made a finable misdemeanor.

The fundamental features of the Mississippi code, its application of the vagrant laws to recalcitrant laborers, its hiring out of those unable to pay fines, and its prohibition of the enticing away of laborers, were adopted by Florida, Alabama, and Georgia; but none of them had by any means so comprehensive a negro code.

In December, 1865, South Carolina adopted a vagrant code much like that of Mississippi, but with some features of its own. Persons of color (defined as persons with

more than one eighth negro blood) were not to pursue any trade, business, or occupation, other than that of husbandry or contract service, without paying a fee of \$100 a year if a shopkeeper or peddler, or \$10 a year if a mechanic, for a license; and they were not to sell any farm product without written license to sell. It was made felony for any person of color to attempt rape upon a white woman; for any person under sentence of transportation from the State to return before the end of his term; or for any person to steal a horse, a mule, or cotton packed in a bale ready for market. No negro was to enter the State to reside there without giving bonds for his good behavior and support. The whole code of laws was revoked by General Sickles, January 17, 1866.

The Louisiana law, in December, 1865, required "agricultural laborers" to make written contracts for a year's labor before January 10th in each year, and forbade the laborer to leave his place of employment before the end of his time of service, unless by consent of his employer, or on account of harsh treatment or breach of contract by the employer. Refusal to work out the time of contract was to be punished by forced labor on public works, unless the offender should consent to return to his labor. Runaways from an employer were declared vagrants, and were to be hired out for not more than twelve months, the employer having the preference, and the wages to go to the poor fund. An aggravation of the contrast between the status of the two races was presented in those States in which suits of the employer against the laborer were decided summarily by arrest and hiring out: at the same time "stay laws" operated to postpone execution of judgment in suits at law for one, two, three, or more years for different fractions of the judgment debt, so that a laborer had little prospect of satisfaction from a suit against an employer.

Such legislation as this is mainly responsible for the reconstruction of the seceding States by Congress. It forced a very fair observer to conclude, in 1865, that, if they should "get the troops away and the States into Congress, three fourths of the counties in the State [Georgia] would vote for such a penal code as would practically reduce half the negroes to slavery in less than a year." In the Northern States it came to be generally believed that this was the deliberate Southern policy; and this belief carried with it a majority ready to support Congress in any counteracting policy whatever, no matter how radical. Not that the vagrant laws worked any great harm in practice: when they were not formally suspended by the strong arm of military power, the officers of the Freedmen's Bureau (see that title) withheld from State courts the cognizance of cases in which freedmen were interested. They served, then, only as an irritation; and the utter futility of the irritation only makes its folly the more glaring. And it was accompanied by other irritations, smaller, indeed, but perhaps as effective. Almost the first business of the reconstructed legislatures, still existing only under military sufferance, was to pass acts laying special taxes, or setting aside portions of the State's income, for pensioning Confederate soldiers, widows, and orphans; to pass resolutions demanding the pardon of leading Confederates; and to change the names of counties to honor their captured chieftains. In the State conventions, highly injudicious language had been used by a few of the more violent delegates; and, though few of these delegates had been warlike during the war, their utterances were quotable. Further, the peculiar action of the North Carolina, South Carolina, and Georgia conventions, which "repealed" the ordinance of secession, instead of declaring it null and void, was imprudent, to say the least. If it is prudent to build a bridge of gold for a flying enemy, it is infinitely more advisable to

avoid irritating a victorious enemy who is disposed to be at peace.

Before Congress met, in December, 1865, the mass of legislation above summarized had fairly taken shape; and, as it seemed to look toward the re-establishment of an *imperium in imperio*, it had already swung the whole Republican party into opposition to the presidential policy. The elections of 1864 had given the Republicans a majority of 40 to 11 in the Senate, and 145 to 40 in the House; and Southern vagrant laws and similar legislation had at last brought this majority abreast of Stevens and made him its leader, as he remained until his death, in 1868. The first step was taken on the opening day in the House, when the clerk, McPherson, in calling the roll, declined to call the names of any of the seceding States, even of Tennessee, Louisiana, and Virginia. He refused to state his reasons, unless by desire of the House. Immediately after the election of a Speaker, Stevens offered the concurrent resolution which contained the essence of reconstruction: that a joint committee of nine Representatives and six Senators should inquire into the condition of the seceding States, and report whether any of them were entitled to be represented in either House; that, until the committee should report and their report should be finally acted on by Congress, no member should be received by either House from any of said States; and that all papers relating to the matter should be referred to the committee without debate. On this pregnant resolution he called for the previous question; debate was shut off, and the resolution was carried by a party vote.

This was a declaration of war against the presidential policy, under which the two Houses were only to decide separately upon admission of members; and the more cautious Senate, December 12th, struck out the last two of its three features. The House agreed, December

14th, but pledged itself against any admissions until the committee should report. January 8, 1866, the House further resolved that the troops should not be withdrawn from the seceding States until the two Houses should direct their withdrawal. The chasm between the President and the majority in Congress rapidly grew wider. February 20th, Stevens again brought up his fundamental idea in a "concurrent resolution concerning the insurrectionary States." It resolved, in order to close agitation and quiet the uncertainty in the South, that no Senator or Representative should be admitted by either House until Congress should declare the State entitled to representation. This was passed at once under the previous question. March 2d, the Senate passed it, and the manner, though not the exact method, of reconstruction was settled, so far as Congress could then settle it.

It was by this time an open secret that there was a very decided disagreement between President Johnson and the party which had elected him. Had Lincoln been one of the parties to the disagreement, there can be no doubt that an adjustment of ideas would have been arranged: Johnson preferred to declare war. The occasion was found, February 22d, two days after the passage of the definitive resolution by the House. A Washington mass-meeting sent a committee to the President with resolutions approving his policy. In his reply he passed beyond the arguments to which he had hitherto confined himself in public speeches, the necessity for conciliation, the impossibility of any withdrawal from the Union, and the right of States to representation. He now proceeded to attack Congress, as having transferred its powers to "an irresponsible central directory" (the leaders of the Republican caucus); he named Stevens, Sumner, and Wendell Phillips as the leading Northern disunionists; and he even taunted his opponents with their cowardly unwillingness "to effect the removal of the presidential



obstacle otherwise than through the hands of the assassin." There is no excuse for such language in the provocative speeches of several of the radical Republicans in and out of Congress. By replying in this fashion, the President only played into the hands of opponents who never gave away a point in the game. He aimed at the Stevens faction, but he only succeeded in alienating the whole mass of the Republican representation. Thereafter, there was no possibility of co-operation between the President and this Congress.

At the beginning of the session many amendments to the Constitution had been proposed, intended to void the rebel debt, and secure the rights of freedmen, that is, to counteract the Southern legislation of 1865-6. One of them, afterward elaborated into section two of the Fourteenth Amendment, was passed by the House, January 31, 1866, but failed to receive a two-thirds vote in the Senate. The speech of February 22d not only brought the Senate to agree to the concurrent resolution; it made constitutional amendment possible as well. April 30th, Stevens introduced an amendment to the Constitution, and a bill providing that when this amendment should become a part of the Constitution, any seceding State which had ratified the amendment, and altered its Constitution in conformity therewith, should be entitled to representation at once.

The amendment was that which in June became the Fourteenth Amendment.<sup>1</sup> It differed from the latter in three essential points: 1, it had not the first sentence of section one, declaring who are "citizens of the United States"; 2, section three forbade all persons who had voluntarily taken part in the Rebellion from voting for members of Congress or for electors before July 4, 1870; and 3, it had not the first sentence of section four, declaring the validity of the national debt. But the sub-

<sup>1</sup> See Constitution.

stance of section three of the amendment, as finally adopted, disqualifying certain classes of leaders from holding office, was contained in a separate bill reported by Stevens at the same time, as an essential part of the whole plan. In the House the amendment was passed May 10th, by a party vote, under the previous question. In the Senate it was debated until June 8th, when it was passed, having been altered into its present form, and the substance of the House disqualifying bill having been substituted for the original third section. June 13th, the House concurred with the Senate's alterations, and the amendment was proposed.

This may be considered as closing the first stage of reconstruction by Congress. The terms now offered to the seceding States were the ratification of the Fourteenth Amendment, repudiation of the rebel debt, disqualification of the specified classes of Confederate leaders until they should be pardoned by Congress, and a grant to Congress of power to maintain the civil rights of the freedmen. There was no effort to control suffrage within the State; only an effort to induce the States to grant universal suffrage, and thus increase their representation in Congress.

While this perfecting of the first congressional plan was going on, the conflict between the President and Congress had gradually become open and bitter. A bill to strengthen the hands of the officers of the Freedmen's Bureau (see that title) in resisting Southern legislation was passed and vetoed; and as the second vote upon the vetoed bill took place, in the Senate, February 21st, before the President's declaration of war, it did not secure a two-thirds vote. The veto of the Civil Rights Bill (see that title) in March met a different fate: the bill was passed at once in both Houses by the necessary two-thirds vote, and became law. A similar result took place upon the veto of a second and still more stringent Freedmen's

Bureau bill in July; and, when Congress adjourned, it was very certain that the Southern vagrant laws had as yet no chance of practical enforcement. Before the adjournment, Tennessee was restored to representation by joint resolution, July 24th, the Senate so amending the preamble as to state that "said State can only be restored to its former political relations in the Union by consent of the law-making power of the United States." Evidently the President had been so poor a strategist that he had only succeeded in putting himself, for the present, outside of the "law-making power" which was to do the work of reconstruction. Everything depended on the result of the congressional elections of the autumn, which were to decide whether the two-thirds Republican majority in Congress would be continued after March 3d following.

As one of the means of preparation for the autumn campaign, the majority of the committee of fifteen presented a report, June 18, 1866, with a great mass of testimony, going to show the prevalence of disloyalty in the seceding States. The report asserted that the seceding States in 1860-1 had deliberately abolished their State governments and constitutions, so far as these connected them with the Union; had repudiated the Constitution, and renounced their representation; that as the Constitution acted on individuals, not on States, the people were still bound to obedience to the laws, though they had abolished their State governments; that the war could not be considered as terminated when the people of the seceding States yielded "an unwilling admission of the unwelcome fact" of their inability to resist longer; and that it was an essential condition that such guarantees of future security should be given as would be satisfactory to the law-making power, which, in the law of 1861, had recognized the existence of rebellion. This, it will be seen, was not quite the theory of either Sumner or Stevens:

unlike the former, it considered the States as existing, though their governments were in a condition of suspended animation; unlike the latter, it maintained the continued existence and force of the Constitution in the seceding States. Practically, however, it agreed with both, in that it made Congress the final arbiter of the guarantees of peace.

The President and his supporters had not spent the winter in idleness. Early in the year a "National Union Club" had been formed in Washington, composed mainly of Republican supporters of the presidential policy. Its executive committee, June 25th, issued a call for a national convention to meet at Philadelphia, August 14th, to be composed of Northern delegates, representing the Lincoln and Johnson vote of 1864, and of Southern delegates who would unite with the former in supporting the presidential policy. July 4th, the Democratic members of Congress issued an address approving the proposed convention. A request to the members of the Cabinet for their approval was followed by the resignation of three of them; the rest were as yet a unit in support of the President.

The convention met as proposed, John A. Dix, of New York, being temporary chairman, Senator Doolittle, of Wisconsin, president, and Henry J. Raymond, of New York (chairman of the Republican National Committee), chairman of the committee on resolutions. The resolutions fully sustained the President and his policy. The somewhat theatrical entrance of the delegates to the building, headed by the delegates from Massachusetts and South Carolina, enabled its opponents to give it the nickname of the "arm-in-arm convention." But it was certainly a well-contrived political movement, and the first prospects of its effectiveness are shown by the anger aroused against its supposed contrivers, Seward and Raymond. The latter was expelled by the Republican National Committee, and

the former was specially denounced in almost every Republican platform.

With the first prospects of success, however, the President's public language became more indiscreet than ever. In his answer to the committee which brought him the Philadelphia resolutions he said:

"We have witnessed in one department of the Government every effort, as it were, to prevent the restoration of peace and harmony in the Union. We have seen hanging on the verge of the Government, as it were, a body called, or which assumes to be, the Congress of the United States, but in fact a Congress of only part of the States. We have seen this Congress assume and pretend to be for the Union, when its every step and act tended to perpetuate disunion, and make a disruption of the States inevitable."

Indeed, his pugnacity had so far gained the upper hand of his discretion that he even gratified his congressional opponents by descending personally into the arena. He chose this most inopportune of all seasons for an excursion to Chicago, for the purpose of laying the cornerstone of the Douglas monument. Starting August 28th, with a large party, including three of his Cabinet, General Grant, Admiral Farragut, and others, he made speeches at various points from New York City to Chicago, and thence to St. Louis, September 8th; and the matter and manner of his speeches grew worse from the beginning. It was alleged that his opponents hired men to irritate and provoke him to indiscretions; but such a political manœuvre was entirely unnecessary. An extract from his Cleveland speech of September 3d will serve as evidence that the President's own temper was the source of a large part of the scandalous interchange of vituperation between himself and his audiences which disgraced his progress:

"I came here as I was passing along, and have been called

upon for the purpose of exchanging views, and ascertaining, if we could, who was wrong. [Cries of 'It's you.'] Who can come and place his finger on one pledge I ever violated, or one principle I ever proved false to? [A voice, 'How about New Orleans?'] Another voice, 'Hang Jeff. Davis.'] Hang Jeff. Davis, he says. [Cries of 'No,' and 'Down with him.'] Hang Jeff. Davis, he says. [A voice, 'Hang Thad. Stevens and Wendell Phillips.'] Hang Jeff. Davis. Why don't *you* hang him? [Cries of 'Give us the opportunity.'] Have n't you got the court? Have n't you got the attorney-general? [A voice, 'Who is your chief justice who has refused to sit upon the trial?'] I am not the chief justice. I am not the prosecuting attorney. [Cheers.] I am not the jury. I will tell you what I did do. I called upon your Congress that is trying to break up the Government—[cheers, mingled with oaths and hisses. Great confusion. 'Don't get mad, Andy.'] Well, I will tell you who is mad. 'Whom the gods wish to destroy, they first make mad.' Did your Congress order any of them to be tried? [Three cheers for Congress.] . . . [A voice, 'Traitor.'] I wish I could see that man. I would bet you now, that, if the light fell on your face, cowardice and treachery would be seen in it. Show yourself. Come out here where I can see you. [Shouts of laughter.]."

The colloquies between the President and his hearers grew more unpleasant as the trip went on, but, nothing daunted, the President continued speaking, and playing into the hands of his opponents to the end.

July 30, 1866, the report of the majority of the reconstruction committee received an unexpected indorsement. An attempt was made on that day to revise the constitution of Louisiana (see that State) by reassembling the adjourned convention of 1864, in New Orleans. The convention's leaders are described by the military commander, Sheridan, as "intemperate political agitators and revolutionary men," whom he himself intended to arrest

on the first overt act against the public peace. But the city authorities saved him the trouble, dispersing the convention "with fire-arms, clubs, and knives, in a manner," says Sheridan, "so unnecessary and atrocious as to compel me to say that it was murder." About 40 whites and blacks were thus killed, and 160 wounded. When the smoke of the congressional elections had cleared away, it was found that the Republican majority had hardly been changed in numbers: in the next Congress it would be 42 to 12 in the Senate, and 143 to 49 in the House. This was more than sufficient to override the President's veto, and continue to keep the President out of reckoning as part of the "law-making power." In *personnel* the new majority was still more pronounced and united than the old majority in opposition to the presidential policy.

When Congress met in December, 1866, the majority came as victors, not as combatants; and their first and natural impulse was to superadd punitive damages. Their first terms, of June, had been rejected: the defeated party was now to pay the penalty of the refusal in the imposition of negro suffrage upon reconstruction. This had always been an essential feature of the Sumner and Stevens programmes, but now for the first time the party majority was united by stress of conflict in support of it. An effort was at once made to impeach the President, but it at first was abortive.<sup>1</sup> The Republican caucus at once took place as the practical governing body of the nation. It requested the Senate to reject the appointments made by the President for political reasons during the recess, and its executive committee was directed to prepare business for Congress.

The committee rapidly reported several bills, which were passed under the previous question. 1. The act of January 22, 1867, directed succeeding Congresses to meet

<sup>1</sup> See Impeachments, VI.

at noon of March 4th. This was to prevent the President from enjoying any nine months' interregnum in future. 2. The act of February 19th directed the clerk of the House to make out the roll of Representatives elected to the next Congress, and to place thereon the names of only such States as were represented in the next preceding Congress. This was to anticipate the possible formation of a *pseudo* Congress, composed of Northern Democrats and Southern claimants, which might be formed and recognized by the President. 3. The Tenure of Office Act limited the President's power of removal, which had been made a political weapon during the campaign. 4. The advanced feeling on the subject of suffrage was shown in the passage of acts establishing universal suffrage in the District of Columbia, January 8th, in the Territories, January 24th, and in the admission of the State of Nebraska, February 9th, the first and third being passed over the veto. 5. In passing the army appropriation bill, in February, a section was added which practically took the command of the army from the President, gave it to General Grant, and made him irremovable. This step was indefensible on any theory. All these measures, however, were only adjuncts of the real business of the session, the consummation of the work of reconstruction.

Between October, 1866, and February, 1867, the legislatures of all the seceding States, except Tennessee, rejected the Fourteenth Amendment by votes nearly or quite unanimous. This action had a double result: as a final rejection of the first terms of reconstruction it made subsequent terms more severe; and, as it showed the absolute impossibility of obtaining the ratification of the Fourteenth Amendment by three fourths of the (then) thirty-six States, while the ten Southern States remained *in statu quo*, it forced Congress to choose between the presidential policy and negro suffrage. So evidently



ready was Congress to make the choice, that, in February, 1867, an official effort, indorsed by the President, was made to induce the Southern legislatures to propose an amendment of their own. It was the Fourteenth Amendment without the disqualifying clause, but with a new clause forbidding a State to secede, or the Federal Government to eject a State or deprive it of its representation in Congress. The plan also included the amendment of each State constitution by giving the right of suffrage to all male citizens who could read and write, and owned \$250 worth of taxable property. The amendment was offered in the legislatures of Alabama and North Carolina, but their refusal to consider it put an end to the proposal.

In the meantime, Congress had gone on with its work. December 13, 1866, Stevens introduced a bill to reconstruct the government of North Carolina, giving the right of suffrage to males able to read and write. January 3, 1867, he called up, in place of the former, a general reconstruction bill. It was sent to the reconstruction committee, which reported, February 6th, the bill finally adopted. Here there was some Republican hesitation. Blaine offered an amendment promising representation on the terms of June, 1866; but this was voted down by Democrats and radical Republicans, and the bill was passed by a vote of 109 to 55. In the Senate the Blaine amendment was offered by Sherman, and carried; but the House refused to concur, the Democrats and radical Republicans again voting in company. The only result of this temporary Republican division was that the majority now reunited, and passed the bill, given below, without the Blaine amendment, and with the far more stringent fifth and sixth sections, which were not in the original bill. The final votes, February 20th, were 128 to 46 in the House, and 35 to 7 in the Senate.

7. *First Reconstruction Bill.*—The preamble of the "act

to provide for the more efficient government of the rebel States'' recited that no legal State governments, or adequate protection for life and property, now existed in those States, and that it was necessary that peace and good order should be enforced in them until loyal and republican State governments could be legally established. The six sections were as follows: 1. The States were to be made subject to the military authority of the United States, and divided into the following districts: I., Virginia; II., North and South Carolina; III., Georgia, Florida, and Alabama; IV., Mississippi and Arkansas; V., Louisiana and Texas. 2. The President was to appoint the commanding officer of each district, not to be below the rank of brigadier-general, and furnish him sufficient military force. 3. The commanding officer was "to protect all persons in their rights of person and property, to suppress insurrection, disorder, and violence," either by military commission, or by allowing local courts to act; "and all interference, under color of State authority, with the exercise of military authority under this act, shall be null and void." 4. Trials were to be without unnecessary delay; punishments were not to be cruel or unusual; and sentences of military commissions were to be approved by the commanding officer, or, if they involved death, by the President. 5. The people of any State might hold a delegate convention, elected by the male citizens of the State on one year's residence, excluding only those disfranchised for participation in the Rebellion, or for felony at common law; but no person excluded from holding office by the proposed Fourteenth Amendment was to vote for delegates or become a delegate. The constitution framed by the convention was to give the elective franchise to those citizens who were allowed to vote for delegates, and was to be ratified by a popular vote under the same conditions of suffrage. When these conditions were fulfilled, when Congress had

approved the constitution, when the new legislature had ratified the Fourteenth Amendment, and when that amendment should become part of the Constitution, the State was to be entitled to representation in Congress. 6. Until thus reconstructed, the civil governments of the rebel States were to be "deemed provisional only, and in all respects subject to the paramount authority of the United States at any time to abolish, modify, control, or supersede the same"; and, "in all elections under such provisional governments," the only voters or office-holders were to be those entitled by this act to vote or hold office.

The bill was vetoed March 2d. The message denied the truth of the preamble; protested against the bill as a needless and utterly unconstitutional attempt to establish an unrestrained military despotism over part of the country in a time of profound peace; and appealed to Congress to admit loyal and qualified members from all the States. The bill was passed over the veto the same day, the vote being a strictly party vote, except that Senator Reverdy Johnson voted in the affirmative. It may be considered the second stage of reconstruction. Military government was to be established, but the reconstruction was still to be done by the State, subject to the final approval of Congress. In order to *induce* such action by the State, its citizens were given the option of a surrender of civil government or voluntary reconstruction; for the sixth section, applying the principle of the bill to "all elections," made reconstruction ultimately inevitable, if elections were to take place. It is certain that several States were moving in the direction of voluntary reconstruction when the new Congress, which met March 4, 1867, anticipated them and hastened the process.

8. *Supplementary Reconstruction Bill.*—March 19th, the new Congress passed an act in nine sections, as follows: 1. Before September 1, 1867, district commanders were

to register male citizens qualified to vote under the act, taking from each registered voter an oath that he was qualified by residence and age and that he had never engaged in rebellion after taking the oath of allegiance as member of any State legislature or of Congress, or as an officer, executive or judicial, of the United States or of any State. 2. The district commander was to hold an election for delegates, equal in number to the lower house of the State legislature, and apportioned according to registration. 3. The question of holding a convention was to be decided at the same election. 4. If a majority of registered voters consented to the convention, the district commander was to give the delegates sixty days' notice of the time and place of meeting; and when the constitution was framed he was to give thirty days' notice of an election to ratify or reject it. 5. When the constitution was ratified, it was to be sent to the President, and by him sent to Congress. If Congress approved it as in conformity with the reconstruction acts, the State was to be declared entitled to representation, and her Senators and Representatives were to be admitted. 6. All elections were to be by ballot, and false swearing was to be punished as perjury. 7. The expenses of the commanding officer were provided for. 8. The convention in each State was to have the power of taxation to meet its own expenses. 9. A verbal mistake in the original act was corrected.

This may be considered the third stage of reconstruction by Congress. Its essential point of difference was that the work of reconstruction was now taken out of the hands of the State, and given to the military commander. In brief, it was, so far as the State was concerned, involuntary reconstruction.

II. THE WORK OF RECONSTRUCTION.—March 11, 1867, the President appointed the district commanders; and the appointees, Generals Schofield, Sickles, Thomas,

Ord, and Sheridan, at once took command of the five districts in the order given. March 15th, Thomas was replaced by Pope. In all the districts the first order was generally an announcement of the assumption of command; and a general direction to the "officers under the existing provisional government" of the State to perform their duties as usual until otherwise directed, though the legislatures were forbidden to meet in the following autumn. Then came a notice that whipping and maiming in punishment of crime must cease, and that the militia must be disbanded. Then came the appointment of boards of registration, and the notification of the test oath; the election of delegates; the meeting of the convention; and the framing of the new State constitution. The machinery worked with comparatively little friction. The whites were in no condition for forcible resistance; and when State treasurers or other officers attempted to balk the work in any way, they were promptly removed, and replaced by civilians or military appointees. The State of Mississippi attempted to obtain from the Supreme Court an injunction forbidding the President and General Ord from executing the reconstruction acts, but the Court refused it, April 15th, on the ground that it could not thus interfere with the purely political acts of another department of the Government. The Attorney-General gave an opinion which practically bound the boards of registration to take the oath of an applicant as good evidence of his right to register. This and other impediments to reconstruction were removed by the supplementary act of July 19, 1867. It gave district commanders and General Grant power to suspend, remove, and replace any State officers who should hinder reconstruction; empowered boards of registration to take evidence, strike off names fraudulently entered, and add names entitled to registry; and provided that no district commander or his appointees should be "bound in his action by the

opinion of any civil officer of the United States." The Alabama constitution was ratified by less than half of the registered vote. The supplementary act of March 11, 1868, therefore, provided that reconstruction elections should be decided by a majority of the votes actually cast.

In all the States the local work of reconstruction went on rapidly. The first of the conventions, in Alabama, met November 5, 1867, and the others followed at various intervals. The constitutions agreed in abolishing slavery, repudiating the rebel debt, renouncing the claim of a right to secede, declaring the ordinance of secession null and void, giving the right of suffrage to all male citizens over twenty-one years of age on a residence qualification, and prohibiting the passage of laws to abridge the privileges of any class of citizens. Further, all the constitutions, except those of North Carolina, Florida, and Georgia, disfranchised all who were disqualified from holding office by the (proposed) Fourteenth Amendment. This disfranchising clause caused the rejection of the constitution in Mississippi, while in Texas and Virginia the popular sentiment was so adverse that no submission to popular vote was ventured on as yet. In the other States, as rapidly as possible, legislatures and governors were elected; the former met and ratified the Fourteenth Amendment; and the latter were formally appointed military governors until reconstruction could be completed. June 22, 1868, an act of Congress approved the constitution of Arkansas as republican, and admitted the State to representation on the fundamental condition that the grant of universal suffrage should never be revoked. June 25th, a similar act admitted North Carolina, South Carolina, Florida, Georgia, Alabama, and Louisiana. July 20, 1868, an act to exclude electoral votes from unreconstructed States was passed over the veto.

The Fourteenth Amendment thus secured the requisite number of State ratifications, and an act of June 25, 1868, directed the President to announce the fact by proclamation. July 11th, he issued a laboriously ambiguous proclamation, announcing *seriatim* the reception of "papers purporting to be resolutions of the legislatures" of the various States, attested by the names of various persons "who therein sign themselves" governor, president of the Senate, etc.; and July 20th, Secretary Seward issued an equally ambiguous proclamation, detailing the ratifications and the withdrawals of Ohio and New Jersey, and announcing that, if these withdrawals were invalid, the amendment was a part of the Constitution. Subsequently he issued another proclamation, free from ambiguity.

In the presidential election of 1868 the two parties, of course, took opposite grounds. The Republican platform congratulated the country on the assured success of the reconstruction policy of Congress. The Democratic platform, while it recognized the questions of slavery and secession as settled by the war, declared "the reconstruction acts (so called) of Congress to be usurpations and unconstitutional, revolutionary and void." This declaration was emphasized by the Brodhead letter, June 30, 1868, of the Democratic nominee for Vice-President, Blair: "There is but one way to restore the Constitution and the Government, and that is, for the President-elect to declare these acts null and void, compel the army to undo its usurpations at the South, disperse the carpet-bag State governments, and allow the white people to reorganize their own governments, and elect Senators and Representatives." The country was not ready for such a programme, and the presidential and congressional elections of 1868 resulted in renewed Republican success.

Much suspicion had been felt by congressional leaders

as to the action which the Supreme Court would take if the constitutionality of reconstruction should come legitimately before it. Early in 1868 such an occasion seemed probable on an appeal from Mississippi on a writ of *habeas corpus* sued out by one McArdle, who had been convicted by a reconstruction military commission. To meet this danger, Stevens at first reported from the reconstruction committee a bill declaring that the jurisdiction of the Supreme Court should not extend to reconstruction legislation. This met little favor, and instead of it the act of March 27, 1868, passed over the veto, repealed the Supreme Court's statutory jurisdiction over appeals on *habeas corpus*.

The question, however, could not be kept down, and in the December term of 1868, in the case of *Texas vs. White*, the Court decided in favor of Congress. During the Rebellion Texas had sold a number of the bonds given her by the United States in 1850,<sup>1</sup> and the new State government sought an injunction to prevent payment to the purchasers. As Texas was still unreconstructed, the Court agreed that, if she were not a State, the suit must be dismissed, so that the whole suit turned on this point. The Court held that the Union was "an indestructible Union of indestructible States"; that ordinances of secession were null and void, but that the States which passed them did not cease to be States of the Union; that their own act of rebellion had suspended their governmental relations to the United States; that Congress must decide, as in the Rhode Island case,<sup>2</sup> what government is established, before it can decide whether it is republican or not; that reconstruction by Congress was valid; and that the governments instituted by the President were provisional only, to continue until Congress could act in the premises. This was not the Sumner, nor the Stevens, but the congressional, theory. It

<sup>1</sup> See Compromises.

<sup>2</sup> See Dorr Rebellion.



is fully summed up in an opinion of Attorney-General E. R. Hoar, of May 31, 1869:

“ The same authority which recognized the existence of the war is the only authority having the constitutional right to determine when, for all purposes, the war has ceased. The act of March 2, 1867, was a legislative declaration that the war which sprang from the Rebellion was not, to all intents and purposes, ended; and that it should be held to continue until State governments, republican in form, and subordinate to the Constitution and laws, should be established.”

It is, therefore, not correct to say that the precedents of reconstruction give Congress the right to reconstruct any State government at pleasure. Such a reconstruction can only come as the result of a rebellion recognized as such by the national authority, and ending in the overthrow of the State government with the rebellion. For example, the Republican State convention of Maryland, February 27, 1867, denounced the proposed State convention, and threatened, if it were persisted in, to appeal to Congress for a reconstruction of the State government. The threat was carried into effect, March 25th, when a reconstruction memorial from the Republican members of the State Legislature was offered in Congress; but Congress very consistently declined to interfere.

Some additional work remained to be done, for reconstruction still hung fire in Texas, Mississippi, and Virginia. The act of April 10, 1869, therefore, authorized the President to call elections in those States for the ratification or rejection of their new State constitutions, submitting such sections as he pleased to a separate vote; but, as punitive terms for their delay, the new legislatures were required to ratify the proposed Fifteenth as well as the Fourteenth Amendment. This may be considered the fourth and final stage of reconstruction by Congress. In the States named, the objectionable clauses were voted

down, the rest of the constitution was ratified, the legislatures fulfilled the conditions required, and the States were admitted by the acts of January 26th (Virginia), February 23d (Mississippi), and March 30, 1870 (Texas). In the same year, however, an attempted evasion of conditions by Georgia brought her into the same position as the three States last named; and it was not until January 30, 1871, that all the States were represented in both Houses of Congress, for the first time since 1860. Reconstruction by Congress was then completed.<sup>1</sup>

III. THE FAILURES OF RECONSTRUCTION.—Prophets were not wanting who predicted the speedy collapse of the highly artificial governmental edifices erected by Congress in the Southern States. Certainly he must have been a very short-sighted person who expected from them an immediate and permanent establishment of the freedmen in all the new privileges granted to them. If the weapon of suffrage, which the white race had secured only after centuries of arduous struggle, could be safely and surely wielded by a race which had hardly ever known any condition other than slavery, we must certainly rank slavery, as an educating process, higher than we have been accustomed to place it. And, on the other hand, if the pyramid must be supported on its apex by national power, it was not to be expected that the country would allow all other business to lapse, and wage an eternal war of irritations on behalf of a helpless race. Plainly, if Southern resistance should be open, the South would be reconquered every decade; and if Southern resistance was guarded but persistent, negro suffrage was destined, sooner or later, to at least a temporary eclipse.

In almost all the States the downward career of the

<sup>1</sup> For the impeachment of President Johnson, see *Impeachments*, VI.; for the Fifteenth Amendment, see *Suffrage*.

reconstructed governments was short and swift. Until the negro legislators learned the machinery of politics, they submitted with patience to the guidance of white leaders, generally Northern immigrants, or "carpet-baggers," and these endeavored with considerable success to keep up at least a semblance of the decent methods to which they had been accustomed. But the negro showed an astonishing quickness in learning the tactics of politics, in grasping the shell while ignoring the kernel. Points of order, parliamentary rulings, filibustering methods, the means of putting fraud into a fair legislative form, almost immediately became as familiar to the negroes as to any other experts in legislation; and then the State treasuries lay at the mercy of a race whose incorrigible and notorious vice, during slavery, had always been theft. No storming force ever made quicker work of a captured city. Most of the "carpet-bag" leaders yielded to the current, and took a share of the spoils. The impoverished treasuries were instantly swept clean. The issue of bonds was then resorted to, except in States like Mississippi, whose bonds were unsalable through previous repudiation; and in this process the lion's share fell to the more expert white leaders. In one State, South Carolina, the debt rose from about \$5,000,000 in 1868, to nearly \$30,000,000 in 1872; and about \$20,000,000 of this amount were issued by the governor by virtue of a legislative permission to issue \$2,000,000. In almost any State, a lobby rich enough to purchase the legislators could secure the passage of an act issuing State bonds in aid of a railroad, supplemented by a subsequent act releasing the State's lien on the road, the whole making up an absolute gift of the money. But the land, which must ultimately be taxed for the payment of such gifts, remained in the hands of the whites. Under universal suffrage, made harsher by a partial white disfranchisement, the whites were helpless, so long as they observed

the forms of law; and in the conflict of interests the forms of law went down.

At first the struggle was mainly peaceful. Negro voters were paid to remain at home on election day, or were induced to do so by threats of loss of work; negro leaders were bribed to wink at false counting or registration; and when the whites had thus carried the legislature, measures were enacted to secure white control of the government in future. In this manner the government fell into white hands in Tennessee in 1869, in North Carolina in 1870, and in Texas, Georgia, and Virginia from their first reconstruction in 1870-71. All these were States in which the white vote only needed union to become dominant. Alabama and Arkansas were much more difficult States, but here the reconstructed governments went down in 1874, after a struggle of some two years, in the course of which actual violence became a political factor. Four States were now left, South Carolina, Florida, Mississippi, and Louisiana, in which the reconstructed governments held their ground. In apparent despair of other means, the "Mississippi plan" was begun in that State in 1875. It was only an amplification of the violent means which had never been left entirely out of calculation. Much of its success was no doubt due to a change of the negro vote. H. R. Revels, the colored United States Senator of the State, thus wrote to President Grant in 1876:

"Since reconstruction, the masses of my people have been enslaved in mind by unprincipled adventurers. My people are naturally Republicans, but, as they grow older in freedom, so do they in wisdom. A great portion of them have learned that they were being used as tools, and, as in the late election, they determined, by casting their ballots against these unprincipled adventurers, to overthrow them."

On the other hand, the evidence that violence was the

finally effective factor is not only overwhelming, but confessed. Bands of horsemen, armed and in uniform, attended and overawed negro meetings; and the roads were picketed to prevent the free transit of negro organizers. Actual violence to the mass of voters was unnecessary, beyond a few midnight whippings. The negro vote was helpless without its leaders and organizers, and the Mississippi plan was to strike only at the tallest. Actual murders do not seem to have been numerous, but they were tremendous in their effects from the position of the victims. There were now left but three States, and in these the Mississippi plan was put into practice in 1876 with a similar success. But in these the "returning boards" prolonged the struggle beyond the election, and threw the whole presidential election of that year into confusion.<sup>1</sup> As soon as President Hayes was seated, in 1877, the last vestige of the congressional scheme of reconstruction disappeared from the surface.

In each State the negro vote was practically suppressed after the overthrow of the reconstructed government. The violence did not necessarily continue in active operation; the negro vote was in part cast and counted, and negro local officers and even Congressmen were occasionally elected. But every one knew that the negro vote would be tolerated just far enough to insure a permanent union of the white vote, and no farther. The results are seen in the significant smallness of the vote in most of the reconstructed States. In 1880, for example, the congressional districts were each supposed to contain at least 131,400 inhabitants, which should have furnished over 30,000 voters. Alabama and Wisconsin correspond very closely in population, and each has eight Congressmen. In 1880 the votes in these districts were as follows: Alabama, 18,645; 22,207; 16,319; 17,644; 11,219; 10,043; 19,146; 25,573: Wisconsin, 31,167; 30,875; 29,226;

<sup>1</sup> See Electoral Commission, Florida, Louisiana, South Carolina.

32,737; 32,926; 38,435; 35,855; 33,894. It thus appears that, on the same census population, Wisconsin furnishes 265,115 voters, an average of 33,139 to a district, while Alabama has but 140,796 voters, an average of 17,599 to a district. It is difficult to find more than one controlling explanation for this essential difference.

It must not be understood that the "subversion of the reconstructed governments" included any essential change in the reconstructed constitutions. These remained formally unaltered, so far as the fundamental conditions of readmission were concerned, though most of the States have revised their constitutions in non-essentials. The Supreme Court has decided that the State, on accepting readmission, is estopped from denying the validity of the conditions; and the Federal judiciary, with the enlarged powers given to it since 1860, would undoubtedly make short work with any attempt to repudiate the conditions of reconstruction. The organic law is unchanged; the revolution has taken place beneath the surface.

*Force Bills.*—At the first indication of attack by violence upon the reconstructed governments, Congress took steps to defeat the attempt. A bill for the enforcement of the last two amendments, commonly called the Force Bill, was introduced, passed by strict party votes, and became law May 31, 1870. It made punishable by fine and imprisonment, or both, with exclusive cognizance to the United States courts, the following offences: hindering any person in the performance of registration or any other qualification for voting; refusing to give full effect to any person's vote; preventing, or confederating with others to prevent, by force, threats, or bribery, any person from qualifying or voting; conspiring to go in disguise upon the highway, or upon the premises of another with intent to deprive any citizen of his constitutional rights; personating other voters, voting or

registering illegally, or interfering with election officers at congressional elections or the registration therefor; violations of State or Federal election laws by State or Federal officials; and violations of the Civil Rights Act (see that title) of 1866, which was expressly re-enacted.

April 20, 1871, a far stronger Force Bill was enacted.<sup>1</sup> It was directed particularly at conspiracies against the civil rights legislation; its second (or conspiracy) section, however, was decided to be unconstitutional by the Supreme Court, January 22, 1883. Its fourth section, providing that such conspiracies, when connived at by the State authorities, should be "deemed a rebellion against the Government of the United States," and be suppressed by the President by the suspension of the writ of *habeas corpus* and the use of the army and navy, was to expire at the end of the next session of Congress. In May, 1872, an attempt was made to extend it for another session. It passed the Senate, but the House refused to consider it. The refusal seems to have been largely due to a belief in the House that the Ku-Klux disorders had subsided. It must be noticed that this section of the act of 1871 was really a first step toward a recognition of a new rebellion, and the result would have been, as before stated, a new reconstruction, if the *casus belli* had not been removed. This standing rule of American constitutional law, the necessary consequence of the reconstruction precedents, makes a singular paradox: we must repudiate State sovereignty; and yet we must hold that a State can practically declare and wage war, be warred against by the nation, and, if conquered, be subjected to the laws of war.

IV. THE SUCCESSES OF RECONSTRUCTION.—We have described the Southern legislation of 1866-7. The infinitely milder and more equitable legislation which followed the successful seizure of power by the white race

<sup>1</sup> See Ku-Klux Klan; Habeas Corpus.

in the different States, in 1869-77, is of itself a proof that reconstruction was, in an essential point, a success. It gave the freedmen a status as men which, if not altogether satisfactory, is more than they could have hoped for in a century under the simple restoration policy. If the ballot is a nullity to the negro, his other rights are not; and he owes this to reconstruction. Further, the ballot itself will not always be a nullity. There stands the unchanged and unchangeable organic law of the States, waiting for the time when the negro shall be ready for the right of suffrage; and we may be sure that the recognition of his readiness will come far sooner and more easily by reason of the fact that it has nothing to fight against in the State constitutions.

We have noticed, also, the portentous reappearance of the seceding States, after their reconstruction by the President, as an *imperium in imperio*. It would have been an impossibility for Southern representatives under that *régime*, however honest their intentions, to divest themselves suddenly of the prejudices and traditions of a lifetime's training, and come back in full sympathy with the economic laws which were thenceforth to attach to their own section as well as to the rest of the country. They must, then, have returned as a compact phalanx of irreconcilables, sure of their ground at home, and a permanent source of irritation, sectional strife, and positive danger to the rest of the country. All this was ended by reconstruction. This process, to speak simply, and perhaps brutally, gave the Southern whites enough to attend to at home, until a new generation should grow up with more sympathy for the new, and less for the old. The energies which might have endangered the national peace were drawn off to a permanent local struggle for good government and security of property. Whatever may be alleged on humanitarian grounds against a policy which for a time converted some of the States into



political hells, it must be confessed that the policy was a success, and that it secured the greatest good of the greatest number.

See, in general, McPherson's *Political History of the Rebellion*, and *History of the Reconstruction* (see index for States, speeches, messages, and legislation); 2 Williams's *History of the Negro Race*; *Congressional Globe*, 1861-72; *Congressional Record*, 1872-3; Hurd's *Theory of Our National Existence* (index under Reconstruction); Appleton's *Annual Cyclopædia*, 1861-77; Fisher's *Trial of the Constitution*, 200; Brownson's *American Republic*, 309; McClellan's *Republicanism in America*; 12 *Stat. at Large*, 255 (Law of 1861); *International Review*, Jan., 1875 (Guarantee Clause); 16 *Atlantic Monthly*, 238, 17: 237, and 18: 761; Cox's *Eight Years in Congress*, 370; Gillet's *Democracy in America*, 304; Harris's *Political Conflict in America*, 359; Pollard's *Lost Cause Regained*; Taylor's *Destruction and Reconstruction*; 2 Stephens's *War Between the States*, 612 (Hampton Roads Conference), 806 (Sherman - Johnston Memorandum); Raymond's *Life and State Papers of Lincoln*, 455, 685; 37 *Atlantic Monthly*, 21; Welles's *Lincoln and Seward*; 6-12 Sumner's *Works*; 12 *Atlantic Monthly*, 507; Callender's *Thaddeus Stevens, Commoner*; 4 Appleton's *Annual Cyclopædia*, 307 (Davis-Wade Manifesto); Andrews's *South Since the War* (1866); *Report of the Joint Committee on Reconstruction*; *Report of the Select Committee on the New Orleans Riot*; Boutwell's *Speeches*; Barnes's *39th and 40th Congresses*; 100 *North American Review*, 540; *The Case of W. H. McArdle*; Pike's *The Prostrate State*; and authorities under articles referred to; Burgess's *Reconstruction and the Constitution*; Goldwin Smith's *The United States*, ch. v., "Rupture and Reconstruction"; Burgess's *Reconstruction and the Constitution*; articles on Reconstruction in the *Atlantic Monthly* for 1901; Blaine's

*Twenty Years of Congress*; Cox, S. S., *Three Decades of Federal Legislation*; Boutwell's *Reminiscences of Sixty Years*; Sherman, John, *Recollections of Forty Years in Senate and House*; Foster on *The Constitution*, vol. i.; Garner's *Reconstruction in Mississippi*; Dunning's *Essays on the Civil War and Reconstruction*; E. G. Scott's *Reconstruction During the Civil War*.

## CHAPTER XV

### RECONSTRUCTION—PART II

**THE FREEDMEN'S BUREAU.**—During the years 1861–2 the numbers of the fugitive slaves within the Federal lines increased with the growth of the anti-slavery feeling in the Federal Government and army. Many of the able-bodied males were finally provided for by the organization of colored troops<sup>1</sup>; the aged, the young, the women, and the sick were the occasion of more difficulty. Wherever the Federal troops held post the freedmen poured in, without money, resources, or any provision for the future further than an implicit confidence in the benevolence and beneficence of the Federal Government. Before the end of the year 1864 the advance of the armies had freed three million persons, of whom at least a million had thrown themselves helplessly upon the Federal Government for support. Attempts to employ some of them upon confiscated or abandoned plantations failed through the rapacity and inhumanity of the agents employed; and in 1863 great camps of freedmen were formed at different points, where the negroes were supplied with rations, compelled to work, and kept under some degree of oversight. The next year, 1864, this great responsibility was transferred from the War to the Treasury Department, but was still a mere incident of the military or war power of the President, as commander-in-chief, and was without any regulation of law.

<sup>1</sup> See Abolition, III.

A bill to establish a bureau of emancipation had been introduced, January 12, 1863, but had failed to pass. Another bill passed the House, March 1, 1864, but failed in the Senate. March 3, 1865, the first "Freedmen's Bureau Bill" became law. It established a "bureau of refugees, freedmen, and abandoned lands" in the War Department, to continue for one year after the close of the Rebellion, under control of a chief commissioner; it gave the President authority to set apart confiscated or abandoned lands in the South to the use of the Bureau; it authorized the assignment of not more than forty acres to each refugee or freedman; it guaranteed the possession of such lands to the assignees for three years; and in general it gave to the Bureau "the control of all subjects relating to refugees and freedmen from rebel States."

The Bureau was organized almost entirely by officers of the regular army, under Gen. O. O. Howard, chief commissioner, and their administrative ability and fidelity made the Bureau's early years very economical and satisfactory. February 6, 1866, a supplementary bill was passed, which continued the Bureau until otherwise provided by law, authorized the issue of provisions, clothing, fuel, and other supplies to destitute refugees and freedmen, made any attempt to deny or hinder the civil rights or immunities of freedmen a penal offence, and required the President to take military jurisdiction of all such cases. This bill was vetoed, February 19th, by President Johnson for the reasons, 1, that it abolished trial by jury in the South, and substituted trial by court-martial; 2, that this abolition was apparently permanent, not temporary; 3, that the Bureau was a costly and demoralizing system of poor relief; and 4, that Congress had no power to apply the public money to any such purpose in time of peace. The bill failed to pass over the veto.

The quarrel between the President and the Republican majority in Congress became open and bitter in the spring of 1866, and about the same time the legislation of Southern legislatures as to freedmen, during their winter sessions of 1865-6, was made public.<sup>1</sup> The result was the passage of the second Freedmen's Bureau Bill, in July, 1866. It corresponded in general intention to the February bill, except that it continued the Bureau for two years only. It was vetoed, July 16th, on the same general grounds as above given, and was passed the same day over the veto. The powers of the Bureau were thus very much enlarged. Its chief commissioner was authorized to use its funds at discretion, to apply the property of the Confederate States to the education of freedmen, to co-operate with private freedmen's aid societies, and to take military jurisdiction of offences against the civil rights or immunities of freedmen. In June, 1868, the Bureau was continued by law for one year longer in unreconstructed States. August 3, 1868, a bill was passed over the veto providing that General Howard should not be displaced from the commissionership, and that he should withdraw the Bureau from the various States, January 1, 1869, except as to its educational work, which did not stop until July 1, 1870. The collection of pay and bounties for colored soldiers and sailors was continued until 1872 by the Bureau, when its functions were assumed by the usual channels of the War Department. Total expenditures of the Freedmen's Bureau, March, 1865-August 30, 1870, were reported at \$15,359,092.27.<sup>2</sup>

THE CIVIL RIGHTS BILL was introduced in the Senate January 29, 1866, and passed February 2d, by a vote of 33 to 12. In the House it was passed March 13th, by a vote of 111 to 38. An abstract of its several sections is as follows: 1. All persons born in the United States and not subject to any foreign power, excluding Indians not

<sup>1</sup> See Reconstruction.

<sup>2</sup> See Abolition, Slavery, Reconstruction.

taxed, were hereby declared to be citizens of the United States, having the same right as white citizens in every State and Territory to sue and be sued, make and enforce contracts, take and convey property, and enjoy all civil rights whatever. 2. Any person who, under color of any State law, deprived any such citizen of any civil rights secured by this act was made guilty of a misdemeanor. 3. Cognizance of offences against the act was entirely taken away from State courts and given to Federal courts. 4. Officers of the United States courts or of the Freedmen's Bureau, and special executive agents, were charged with the execution of the act. 5. If such officers refused to execute the act, they were made subject to fine. 6. Resistance to the officers subjected the offender to fine and imprisonment. 7. This section related to fees. 8. The President was empowered to send officers to any district where offences against the act were likely to be committed. 9. The President was authorized to use the services of special agents, of the army and navy, or of the militia, to enforce the act. 10. An appeal was permitted to the Supreme Court.

There is a curious likeness, *mutatis mutandis*, between some of the sections of the bill and the Fugitive Slave Law of 1850.

The bill was vetoed March 27th, and again passed, over the veto, in the Senate April 6th, and in the House April 9th. The constitutional objection to the bill was that the power to pass it could be found nowhere in the Constitution except in the Thirteenth Amendment (prohibiting slavery), and that this in no way involved the assumption by Congress of the duty of protecting the civil rights of citizens, which had always belonged to the States; and, further, that, while the decision in the Dred Scott case stood unimpeached, negroes might be freed but could not become citizens. Various amendments were proposed in February and March, 1866, for

the purpose of overturning the Dred Scott decision. April 30th, after the conflict between Congress and the President had become flagrant, Thaddeus Stevens, of Pennsylvania, in the House, reported from a joint committee that which was afterward modified into the Fourteenth Amendment. Its first section contained the gist of the resolutions above referred to. It was passed in the Senate June 8th, by a vote of 33 to 11, and in the House June 13th, by a vote of 138 to 36.<sup>1</sup>

Senator Charles Sumner, of Massachusetts, was the special champion of an amendment to the preceding act which should prevent common carriers, inn-keepers, theatre-managers, and officers or teachers of schools, from distinguishing blacks from whites; should prevent the exclusion of negroes from juries; and should give Federal courts exclusive cognizance of offences against it. A bill to this effect was offered by him as an amendment to the amnesty act in 1872,<sup>2</sup> but failed by a single vote, 29 to 30. The same bill was introduced in the House December 9, 1872, and referred. April 30, 1874, shortly after Mr. Sumner's death, it passed the Senate, but failed in the House. In February, 1875, the bill finally passed both Houses, and became a law March 1st.<sup>3</sup>

AMNESTY.—I. December 8, 1863, President Lincoln issued his first proclamation of amnesty. It was based upon the President's constitutional power to grant reprieves and pardons for offences against the United States, except in cases of impeachment. Congress had authorized such a proclamation by act of July 17, 1862. The proclamation offered a full pardon and restoration of property rights, except in slaves and in cases where rights had accrued to third parties, to all, with the exceptions hereafter given, who would take and keep the following oath:

“ I, ———, do solemnly swear, in presence of Almighty

<sup>1</sup> See Reconstruction.

<sup>2</sup> See Amnesty.

<sup>3</sup> See Reconstruction.

God, that I will henceforth faithfully support, protect, and defend the Constitution of the United States, and the Union of the States thereunder; and that I will, in like manner, abide by and faithfully support all acts of Congress passed during the present Rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress, or by decision of the Supreme Court; and that I will, in like manner, abide by, and faithfully support all proclamations of the President, made during the existing Rebellion, having reference to slaves, so long and so far as not modified or declared void by decision of the Supreme Court. So help me God."

The following classes of persons were excepted: civil or diplomatic officers, army officers above the rank of colonel, and naval officers above the rank of lieutenant, in the Confederate service, all who had left judicial stations or seats in Congress, or had resigned commissions under the United States, to aid the Rebellion, and all who had treated Federal colored soldiers or their officers otherwise than lawfully as prisoners of war. March 26, 1864, a supplementary proclamation explained that the first proclamation was not intended to embrace prisoners of war.

II. May 29, 1865, President Johnson issued a proclamation offering amnesty, as in President Lincoln's first proclamation, to those who would take and keep the following oath:

"I, ———, do solemnly swear, or affirm, in presence of Almighty God, that I will henceforth faithfully support and defend the Constitution of the United States and the Union of the States thereunder, and that I will, in like manner, abide by and faithfully support all laws and proclamations which have been made during the existing Rebellion with reference to the emancipation of slaves. So help me God."

In addition to the classes named in the proclamation of December 8, 1863, the following classes were excepted:



all foreign agents of the Confederate States, graduates of West Point or Annapolis in the rebel army, governors of States in rebellion, deserters, privateersmen, Canada raiders, prisoners of war, persons worth over \$20,000, and persons who had already taken and broken the oath required. Persons in the excepted classes were to make special application for pardons. A bill to repeal the act of July 17, 1862, above mentioned, was passed by the House December 3, 1866, and by the Senate January 7, 1867, and became a law through the President's failure to sign or veto it. He preferred to treat the original act and the repealer as nullities, trenching on the President's constitutional pardoning power.

III. September 7, 1867, President Johnson issued another proclamation of amnesty. It recited the substance of former proclamations, including that of April 2, 1866, declaring the Rebellion at an end, offered full amnesty to all who would take and keep the oath, above given, substituting "late" for "existing" in describing the Rebellion, and excepted the following classes, "and no others": the President, Vice-President, and heads of departments of the Confederate Government, its foreign agents, military officers above the grade of brigadier-general, naval officers above the grade of captain, governors of States, all who had unlawfully treated prisoners of war, all legally held in confinement, and all parties to the assassination of President Lincoln.

IV. July 4, 1868, by proclamation, President Johnson offered full pardon and amnesty for treason, with restoration of property rights, except as to slaves and confiscated property, to all except those who might be under indictment or presentment in any Federal court. No form of oath was prescribed.

V. December 25, 1868, by proclamation, President Johnson, by virtue of the power and authority in him vested by the Constitution, proclaimed and declared un-

conditionally and without reservation, a full pardon and amnesty for treason to all who directly or indirectly participated in the Rebellion, without the formality of any oath.<sup>1</sup>

VI. By the third section of the Fourteenth Amendment, which was declared in force July 28, 1868, disability to hold office was imposed on those who in higher positions had engaged in rebellion, with permission to Congress to remove such disability. After the disability of many persons had been removed by acts of Congress applicable only to individual cases, the act of May 22, 1872, removed the political disability of all persons except those who had engaged in rebellion, having been members of the 36th or 37th Congresses, officers in the judicial, military, or naval service of the United States, or heads of departments or foreign ministers of the United States. An attempt in 1873 to make the removal universal failed.

KU-KLUX KLAN, a secret, oath-bound organization, otherwise known as "The Invisible Empire," "The White League," "The Knights of the White Camelia," or by other names, formed in the Southern States during the reconstruction period, for the primary purpose of preventing the negroes, by intimidation, from voting, or holding office. Until the abolition of slavery necessity compelled a rigid policing of the black population by official or volunteer guards.<sup>2</sup> The origin of the "Ku-Klux" order was in all probability a revival of the old slave police, at first sporadic, to counteract the organization of "Loyal Leagues," or "Lincoln Brotherhoods," among the negroes, and afterward epidemic, as the process of reconstruction by Congress began to take clear form.

The various moving causes which led to the reconstruction of Southern State governments by Congress are

<sup>1</sup> See Reconstruction.

<sup>2</sup> See Slavery.

elsewhere given.<sup>1</sup> When the preparations for reconstruction had gone far enough to make it reasonably certain that negro suffrage was to be the law in the South, the opposition, hopeless of open revolt, took the shape of this secret society. Attempts have been made to date its origin back to 1866, under the rule of Governor Brownlow in Tennessee; but the most probable date is early in 1867. The constitution mentioned below dates the first election of the order in May, 1867. The place of its origin is entirely unknown, and it was probably at first a congeries of associations in different States, originated without concert and from a common motive, and finally growing together and forming one combined organization in 1867. No authentic account of its origin, founder, or date has come to light.

A "prescript," or constitution, of the order, discovered in 1871, shows an attempt to imitate the machinery of Masonic and other similar societies. The name of the order is not given; its place is always filled by stars (\*\*). A local lodge is called a "den"; its master the "cyclops," and its members "ghouls." The county is a "province," and is controlled by a "grand giant" and four "goblins." The congressional district is a "dominion," controlled by a "grand titan" and six "furies." The State is a "realm," controlled by a "grand dragon" and eight "hydras." The whole "empire" is controlled by a "grand wizard" and ten "genii." The banner of the society was "in the form of an isosceles triangle, five feet long and three feet wide at the staff; the material yellow with a red scalloped border about three inches in width; painted upon it, in black, a *Draco volans*, or flying dragon, with the motto *Quod semper, quod ubique, quod ab omnibus*." The origin, designs, mysteries, and ritual were never to be written, but were to be communicated orally. The dress of the members, when in regalia, is

<sup>1</sup> See Reconstruction.

not given, but is known to have been mainly a hood covering the head, with holes for the eyes and mouth, and descending low upon the breast; fantastic or horrible figures according to the owner's ingenuity; in other respects the ordinary dress.

A more effective plan could hardly have been devised with which to attack a race which was superstitious, emotional, and emasculated by centuries of slavery. Before it had been tried very long the cry of "Ku-Klux" was sufficient to break up almost any negro meeting at night; the suspicion that disguised horsemen were abroad at night was sufficient to keep every negro in his own cabin; and the more virile and courageous of their number, who had become marked as leaders, were left to whipping, maiming, or murder at the hands of the "ghouls" without any assistance from their cowering associates. By day the negroes would fight, and often did so; by night the "Ku-Klux" had the field to themselves.

So long as the attacks of the order were confined to the negroes there was little need of any means more violent than whipping. A more difficult problem was that of the "carpet-baggers" and "scalawags," who with the negroes made up the Republican party in the South. The "carpet-baggers" were Northern men, whose interests in the South were supposed to be limited to the contents of their carpet-bags; the "scalawags" were Southerners who, either from conviction or from interest, had joined the Republican party and taken part in reconstruction. Neither of these classes was easily to be terrorized, and in their cases the order very easily drifted into murder, secret or open. Before the end of its third year of existence the control of the order had slipped from the hands of the influential men who had at first been willing, through it, to suppress what seemed to be the dangerous probabilities of negro suffrage, and had been seized by the more violent classes who used its

machinery for the gratification of private malice, or for sheer love of murder. Even before the appointment of the final congressional investigating committee in 1871, the order had "departed from its political work, and gone into murder for hire and robbery." It had thus become dangerous to the very men who had at first tacitly or openly sanctioned its existence, and open attempts to suppress it were only checked by a fear of being classed among the "scalawags."

Throughout the winter of 1870-71 the Ku-Klux difficulties in the South were debated in Congress, and a joint investigating committee was appointed by the two Houses, March 21st. Two days afterward a message from President Grant informed Congress that the condition of affairs in the South made life and property insecure and interfered with the carrying of the mails and the collection of the revenue; and asked that Congress would enact measures to suppress the disorders.

The result was the passage of the so-called "Force Bill," April 20, 1871. Its provisions were as follows: 1, it gave Federal courts cognizance of suits against any one who should deprive another of any rights, privileges, or immunities secured by the Constitution, "any law, regulation, custom, or usage of a State to the contrary notwithstanding"; 2, it denounced punishment by fine, imprisonment, or both, against any conspiracy of two or more persons to overthrow, put down, destroy, or levy war against the Government of the United States, to delay the execution of Federal laws, or to deter any one from voting, holding office, or acting as a witness or juror in a Federal court; 3, in case the State authorities were unable or unwilling to suppress disorders intended to deprive any class or portion of the people of their constitutional rights, it authorized the President to employ the Federal land and naval forces or militia to suppress the disorders, and 4, to suspend the privilege of the writ of

*habeas corpus* "during the continuance of such rebellion against the United States," the trial provision of the act of March 3, 1863, to remain in force<sup>1</sup>; 5, it authorized Federal judges to exclude from juries persons whom they should judge to be in complicity with such conspiracy; 6, it gave a civil remedy to injured parties against persons who, having knowledge of conspiracy and power to prevent injuries being done, should neglect or refuse to do so; and 7, it confirmed former civil rights legislation. The *habeas corpus* section was to remain in force only until the end of the next regular session.

October 12, 1871, President Grant issued a preliminary proclamation calling on members of illegal associations in nine counties of South Carolina to disperse and surrender their arms and disguises within five days. Five days afterward another proclamation issued, suspending the privileges of the writ of *habeas corpus* in the counties named. Arrests, to the number of two hundred, were at once made, and the more prominent persons implicated were prosecuted to conviction. In other parts of the South the organization was rapidly run to death, the most effectual provision being that which gave Federal judges power to exclude suspected persons from juries. It is probable that the order was completely overthrown before the end of January, 1872.

The generic name of "Ku-Klux Troubles," however, was still applied to the political and race conflicts which still continued in the South. The name was made more odious by the report of the joint congressional investigating committee, February 19, 1872, in thirteen volumes, covering about seven thousand printed pages of testimony, which had been taken during the previous year. It only lacks such a collation and comparison of evidence as that of the English chief justice in the Tichborne case to make it one of the most valuable sources of information

<sup>1</sup> See Habeas Corpus.

as to the social condition of the South during the reconstruction period. The reports of the majority and minority of the committee do not supply the need, for both are rather partisan than judicial. The majority (Republican) report considered the issue between anarchy and law in the Southern States fairly made up; the minority (Democratic) report, while it did not deny that "bodies of armed men have, in several of the States of the South, been guilty of the most flagrant crimes," held that the perpetrators had no political significance, nor any support by the body of the people. The latter report seems to have been the more nearly correct at the time it was made, but only because the order itself had already become dangerous to both friends and foes. A line of citations from the volumes of the report is given below, from which the reader may learn the general features and purposes of the order.

At the following session of Congress, May 17, 1872, a bill to extend the *habeas corpus* section of the "Ku-Klux" act for another session was taken up in the Senate and passed. May 28th, an attempt to suspend the rules in the House, so as to consider the bill, was lost, two thirds not voting for it; and the bill was not further considered by the House.

The attempt to check negro suffrage in the South by the irresponsible action of disguised men was practically abandoned after 1871. From that time such attempts were confined to open action, the presence of organized parties of whites at negro meetings, and the employment of every engine of the law by an active, determined, and intelligent race. The results were the overthrow of the reconstructed State government in every Southern State before 1878,<sup>1</sup> and the formation of the so-called "solid South."<sup>2</sup>

<sup>1</sup> See Insurrection, II.; and the names of the States, particularly Mississippi and South Carolina.

<sup>2</sup> See Parties after 1860.

**IMPEACHMENTS.**—The Constitution only provides that the House of Representatives shall have the sole power of impeachment of the President, Vice-President, and “all civil officers of the United States”; that the Senate shall have the sole power to try impeachments; that judgment, to be given by two thirds of the Senators present, shall only involve removal from, and disqualification to hold, office under the United States; that a person convicted shall not be pardoned by the President, and shall still be liable to indictment and punishment at law. When the President of the United States is tried, the Chief Justice presides over the Senate.

The Constitution has not attempted to ascertain and classify the offences which are impeachable. It has only stated (Art. I., § 3, ¶ 7) that “the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law”; and (Art. II., § 4) that “the President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for and conviction of treason, bribery, or other high crimes and misdemeanors.”

From this omission of specification two antagonistic opinions have arisen. 1. It is held that the power of impeachment extends only to such offenders as may afterward be indicted and punished according to law; that is, that the House can only impeach, and the Senate remove, for indictable offences. This would make the power of impeachment defined and circumscribed. 2. On the contrary, it is held that the phrase “high crimes and misdemeanors” was intentionally left undefined in order that the power of impeachment might embrace not only indictable offences, but also that wider and vaguer class of political offences which the ordinary courts of law cannot reach.

This would make the power of impeachment under the American Constitution closely similar to that which has



been exercised under the British Constitution. It would then include all misdemeanors which might seem to a majority of the House, and to two thirds of the Senate, so heinous or so disgraceful as to make the offender's exclusion from office necessary to the well-being of the country; and the punitive effect of the popular vote would be relied upon to deter a dominant party from abusing the power for selfish ends. The best results have probably been reached by leaving the question open to individual judgment.

Many minor questions are still unsettled, and will probably long remain so. 1. It cannot be considered settled that an officeholder may escape impeachment for acts done while in office, by resignation, expulsion, or the close of his term of office. The point was made, but not decided, in Blount's case (see I.), and although it prevented a two-thirds majority in Belknap's case (see VII.), the power of impeachment was there maintained by a very decided majority of the Senators, including nearly all the ablest lawyers of the Senate. On the one hand is the provision that only "civil officers" are liable to impeachment; and the conjunction of "removal from office *and* disqualification" would seem to imply that the removal was the first essential to punishment, and that disqualification could not be inflicted where removal had for any reason become impossible. On the other hand is the obvious objection, on the score of public policy, to allowing a suddenly discovered criminal in office to escape impeachment by an aptly timed resignation. 2. Blount's case has apparently settled that Senators and Representatives are not impeachable; but the decision in that case was made against strong opposition at the time, and has been repeatedly objected to since. In favor of the decision is the language of the Constitution; it limits the power of impeachment to "the President, Vice-President, and all civil officers," but in other places mentions

members of Congress and "civil officers" in distinct categories. Against it is the decision by the Senate, in January, 1864, that an oath prescribed for "civil officers," by the act of July 2, 1862, must be taken by Senators also. 3. The power of the Senate to arrest the accused, or "sequester" or suspend him from office, pending judgment on the impeachment, is very doubtful, and is defended mainly by parallel with the practice in English impeachments. The language of some of the framers of the Constitution and their contemporaries, however, goes to show that they considered the power of suspension to be in the Senate; and Senator Sumner, on Johnson's trial, argued that the selection of the Chief Justice to preside over the trial of a President was not because the Vice-President was supposed to be an interested party, but because he was presumed to be engaged in performing the duties of the President during the necessary suspension of the latter from office.

The power of arrest was exercised by the Senate, though under peculiar circumstances, in Blount's case. It is, however, usually a power not necessary to secure attendance, since the only judgment in case of conviction is the stigma of inability to hold office, and punishment does not extend to death or deprivation of property; nor, in any event, is the attendance of the accused necessary; since he may be tried, even condemned, in his absence. (Note Blount's, Pickering's, and Humphreys's cases.) (See I., II., V.) 4. Can an unjust conviction on impeachment ever be reversed by a subsequent Congress? This is a question which has never been raised, and the now acknowledged equity of the whole line of senatorial decisions in impeachment cases gives strong reason for hope that it will never be necessary to raise it.

The impeachment cases in our national history are given below. It has not been considered necessary to go into impeachments by State Legislatures, but reference

is made among the authorities to several important cases of this kind.

I. *William Blount*.—July 3, 1797, the President sent to Congress a number of papers on the relations of the United States and Spain. Among them was a letter from United States Senator Blount, of Tennessee, to an Indian agent among the Cherokees, from which it appeared that Blount was engaged in a conspiracy to transfer New Orleans and the neighboring territory from Spain to Great Britain, by means of a British fleet and a land force to be furnished by Blount. On receipt of notice that the House intended to impeach him, the Senate at first put him under \$50,000 bonds to appear for trial, but afterward expelled him, July 9th. His sureties then surrendered him to the Senate, but he was again released on decreased bail. The whole of the next session, November 13, 1797–July 16, 1798, hardly sufficed for the preparation of the five articles of impeachment, which were finally brought to trial, December 24, 1798. Blount, who had in the meantime been elected to the Senate of his State, did not appear, but his counsel plead, 1, that, as Senator, he was not a “civil officer” liable to impeachment, and, 2, that since his expulsion he was no longer a Senator. The Senate sustained the first plea, and Blount was acquitted for want of jurisdiction.

II. *John Pickering*.—March 3, 1803, the House impeached Judge Pickering, of the Federal District Court for the district of New Hampshire. The four articles against him charged him with decisions contrary to law, and with drunkenness and profanity on the bench, and were tried by the Senate at once. Judge Pickering did not appear, but his son attempted to prove his father’s insanity. The managers on the part of the House, in reply, maintained that the insanity was a consequence of his habitual drunkenness. He was convicted March 12th, by a party vote, the Federalists voting in the negative,

and removed; the further disqualification to hold office was not inflicted.

III. *Samuel Chase*.—One of the ablest of the Federal Justices of the Supreme Court was Chase, of Maryland, appointed January 27, 1796. The practice of adding disquisitions on current politics to charges to grand juries was then common with American judges, as it had long been in Great Britain; and after the downfall of the Federal party in 1801 Chase kept up the practice with a bitterness and ability equally displeasing to the dominant party. In the House, January 5, 1804, Randolph obtained a committee to investigate Chase's official conduct; and on their report Chase was impeached, November 30, 1804, and Randolph was appointed chief manager. The articles of impeachment were presented to the Senate, December 7, 1804, and the trial was begun January 2, 1805. There were eight articles: 1, for arbitrary and unjust conduct in the trial of John Fries for high treason, in April, 1800, in refusing to allow the prisoner's counsel to argue various law points, and in announcing his opinion as already formed, so that the prisoner's counsel threw up the case; 2, for refusing to excuse a juror who had prejudged the guilt of J. T. Callender, in a trial under the Sedition Law, in May, 1800, at Richmond; 3, for refusing to allow one of Callender's witnesses to testify; 4, for interrupting and annoying Callender's counsel, so that they abandoned his case; 5, for arresting, instead of summoning, Callender in a case not capital; 6, for refusing to allow Callender a postponement of his trial; 7, for urging an unwilling Delaware grand jury to find indictments under the Sedition Law; and 8, for "highly indecent and extra-judicial" reflections upon the Government of the United States before a Maryland grand jury. The eighth article covered his real offence; the others were the fruits of the committee's zealous research into his past official life.

The defence disproved very much of the matter alleged, and as to the remainder Chase's counsel argued successfully that his conduct had been "rather a violation of the principles of politeness than of the principles of law; rather the want of decorum than the commission of a high crime and misdemeanor." On the third, fourth, and eighth articles Chase was pronounced guilty by a small majority, the largest, nineteen to fifteen, on the eighth; on the other articles a majority found him not guilty; and as a two-thirds majority was not given for any article, he was pronounced not guilty on all, March 1, 1805. The result of the trial led to some efforts on the part of the Democratic leaders to change the tenure of Federal judges.<sup>1</sup> Judge Chase held his seat on the bench until his death, June 19, 1811.

IV. *James H. Peck*.—December 13, 1830, Judge Peck, of the Federal District Court for the district of Missouri was tried on an impeachment passed by the House at the previous session. The article against him alleged arbitrary conduct, in 1827, in punishing for contempt of court an attorney who had published a criticism of Judge Peck's opinion in a land case. In this case the vote of the Senate was twenty-one guilty, twenty-four not guilty, and Judge Peck was acquitted.

V. *West H. Humphreys*.—At the outbreak of the Rebellion the district judges of the Federal courts in the seceding States, and one of the Justices of the Supreme Court (James A. Campbell, of Alabama), resigned. Justices Catron, of Tennessee, and Wayne, of Georgia, notwithstanding the secession of their States, retained their positions as Justices of the Supreme Court, and their loyalty was never questioned. On the other hand, Judge Humphreys, of the Federal District Court of Tennessee, while actively engaged in the Rebellion, had not resigned, and impeachment became necessary in

<sup>1</sup> See Judiciary, VII.

order to vacate his position. Recourse was had to a secession speech made by him in Nashville, December 29, 1860, and this, and his acceptance of the office of Confederate judge, were made the basis of seven articles of impeachment by the House, on which he was convicted by a unanimous vote of the Senate, June 26, 1862.

VI. *Andrew Johnson*.—January 7, 1867, Jas. M. Ashley, of Ohio, submitted a resolution in the House directing the judiciary committee to investigate his charge that President Johnson had corruptly used the appointing power, the pardoning power, the veto power, and the public property, and had corruptly interfered in elections. The House adopted the resolution, and five of the nine members of the committee reported, November 25, 1867, in favor of impeachment. Their resolution to that effect was lost, December 7th, by a vote of 56 to 109.

In March, 1867, Congress had enacted that civil officers "holding or hereafter to be appointed" to any office by confirmation of the Senate, should retain office until a successor should be confirmed by the Senate, except that Cabinet officers, unless removed by consent of the Senate, should "hold their offices for and during the term of the President by whom they may have been appointed, and for one month thereafter." At the same time Congress had practically taken the command of the army from the President,<sup>1</sup> and had made the Secretary of War really independent of, as well as irremovable by, the Executive.

All the Cabinet, except the Secretary of War, E. M. Stanton, seem to have been in sympathy with the President in March, but the estrangement between Stanton and Johnson increased so rapidly that the President suspended the Secretary of War, August 12, 1867, as he was allowed to do, by the Tenure of Office Act, while the Senate was not in session, and appointed the General of the

<sup>1</sup> See Reconstruction.

army, U. S. Grant, Secretary *ad interim*. Within twenty days after the Senate should meet, the President was required by the Tenure of Office Act to lay before the Senate his reasons for any suspension during its intermission; in Stanton's case he did so, and the Senate, January 13, 1868, by a party vote of 35 to 6, non-concurred in Stanton's suspension. General Grant at once notified the President that his functions as Secretary *ad interim* had ceased. Secretary Stanton immediately resumed his place, and kept it throughout the subsequent proceedings until May 26th, when he finally relinquished it.

The suspension of Stanton was a mistake, in so far as it recognized the mode of procedure laid down in the Tenure of Office Act, since the vital point in Johnson's case was the applicability of that act to Secretary Stanton. The President, indeed, asserted that General Grant had promised to hold the office in spite of the Senate's non-concurrence, and thus force Secretary Stanton, by an appeal to the courts, to test the constitutionality of the act; and the assertion was sustained by all the Cabinet officers except Stanton, but was denied by General Grant.

The plan, which had been balked by Grant's surrender of the office to Stanton in January, was resumed in February with a more reliable instrument, and apparently with better legal advice. February 13th, the President desired General Grant to appoint Gen. L. Thomas adjutant-general, and the appointment was made. February 21st, the President removed Stanton, as if the Tenure of Office Act did not apply to his case, and appointed Thomas Secretary of War *ad interim*, under the law of February 13, 1795, which allowed the appointment of such officers, in emergencies, for not more than six months, without confirmation by the Senate. Stanton refused to vacate the office, and notified the Speaker of the House of his attempted removal. February 24th,

the House adopted a resolution of impeachment by a vote of 126 to 42, and on the following day a committee impeached the President at the bar of the Senate. By tacit consent, all attempts to obtain possession of the War Department were dropped to abide the result of the impeachment.

The House managers of the impeachment were John A. Bingham of Ohio, Geo. S. Boutwell and Benj. F. Butler of Massachusetts, Jas. F. Wilson of Iowa, Thomas Williams and Thaddeus Stevens of Pennsylvania, and John A. Logan of Illinois.

The President's counsel were Henry Stanbery and W. S. Groesbeck of Ohio, Wm. M. Evarts of New York, Thos. A. R. Nelson of Tennessee, and Benj. R. Curtis of Massachusetts.

March 4th, the managers presented eleven articles, impeaching the President of the following high crimes and misdemeanors: 1. The issuance of an order removing Stanton, with intent to violate the Tenure of Office Act, after the Senate had refused to concur in his suspension; 2, the issuance of an order to Thomas to act as Secretary of War *ad interim* while the Senate was in session, no "vacancy existing" in the War Department, with intent to violate the Tenure of Office Act and the Constitution, and 3, without authority of law; 4, conspiracy with Thomas and other persons with intent, by intimidation and threats, to prevent Stanton from acting as Secretary; 5, to prevent the execution of the Tenure of Office Act; 6, to seize the War Department's property by force, and, 7, to violate the Tenure of Office Act; 8, the appointment of Thomas with intent to control unlawfully the disbursement of the War Department's moneys; 9, an attempt to induce General Emory, commanding the Department of Washington, to disobey the act above referred to, regulating the issuance of orders to the army; 10, the use, in regard to Congress, of "utterances, declar-



ations, threats, and harangues, highly censurable in any, and peculiarly indecent and unbecoming in the Chief Magistrate of the United States, by means whereof said Andrew Johnson has brought the high office of President into contempt, ridicule, and disgrace, to the great scandal of all good citizens"; and 11, his public declaration that the Thirty-ninth Congress was no constitutional Congress, but a Congress of part of the States, "thereby denying and intending to deny that its legislation was obligatory upon him, and that it had any power to propose amendments to the Constitution," and designing to prevent the execution of the Tenure of Office Act, the Act for the government of the army, and the reconstruction acts. The last two articles were additions to the original nine articles, based upon certain speeches made by the President during a tour to St. Louis in August and September, 1866.

The answer of the President, through his counsel, may be reduced to four heads. 1. As to articles 1-3, he averred that Stanton, having been appointed by President Lincoln, January 15, 1862, having served out "the term of the President by whom he had been appointed," and never having been reappointed, was not embraced in the terms or the intention of the Tenure of Office Act, of March 2, 1867; that Stanton had taken office and kept it "during the pleasure of the President" according to the terms of the act of August 7, 1789, organizing the War Department, and according to the practice of all Presidents and Congresses down to March, 1867; that Stanton's removal was not in violation of the Tenure of Office Act; and that the appointment of Thomas was to fill an existing vacancy. 2. As to articles 4-7, he denied any conspiracy, any intimidation, or any authority to use force given by him to Thomas, and asserted that the only connection between him and Thomas was an order from him as superior and obedience to it by Thomas.

3. He denied the truth of article 8. 4. As to articles 9–11, he claimed the right of freedom of opinion and of freedom of speech; he asserted that his declarations to Emory and to public meetings were identical with his messages to Congress; and called attention to the fact that the allegations in these articles did not “touch or relate to any official act or doing” of the President.

The trial, beginning with the organization of the Senate as a court to try the impeachment, March 5th, ended March 26th. Excluding the twenty Senators from Southern States not yet admitted, the total number of Senators was fifty-four; the two-thirds vote, needed for conviction, would, therefore, have been thirty-six to eighteen. There were twelve Democratic Senators, all of whom were quite certain to vote not guilty, so that it was necessary that at least seven Republican Senators should vote against conviction on all the articles in order to secure an acquittal. Before a vote was reached it was very apparent that there were but three articles (2, 3, and 11) on which a conviction was possible. On the “conspiracy” articles (4–7), and the “Emory” article (9), the proof had failed to convince many Republican Senators. The “Butler” article (10) consisted of unofficial utterances of the President. On the “Stanton” articles (1, 8) several Republican Senators asserted that the Tenure of Office Act was admitted at the time of its passage not to apply to President Lincoln’s Secretaries; Sherman, of Ohio, one of the Senate conferees on the act, says in his opinion: “Can I, who still believe it to be the true and legal interpretation of those words, can I pronounce the President guilty of crime, and by that vote aid to remove him from his high office, for doing what I declared and still believe he had a legal right to do? God forbid.” May 16th, by order of the Senate, the vote was taken on the eleventh article first, and was found to be thirty-five for conviction and nineteen for acquittal, seven Republican

Senators voting in the minority. The Senate adjourned at once until May 26th, when a vote was taken on the second and third articles, with exactly the same result as on the eleventh. The Senate then adjourned *sine die*, without voting upon the other articles, and the Chief Justice directed a verdict of acquittal to be entered upon the record.

The strength of the eleventh article lay in its charge that the President had not faithfully executed the Tenure of Office Act or the reconstruction acts, his declarations that Congress was "not a Congress" being apparently intended to show his *mala fides*. Its weakness lay in its vagueness, and in the fact that it charged the President with "designing and contriving" means to avoid the execution of the law, rather than with any overt acts. As to this article, then, the difference of opinion went mainly to the meaning of the language. The second and third articles, particularly the former, seem to have been lost because of their complication with Stanton's removal, and their statement that "no vacancy existed" when Thomas was appointed. If Stanton's removal were legal, the Tenure of Office Act would then seem to apply to his office for the first time *after* he had been removed; and the absolute prohibition, in the second section of the act, of *ad interim* appointments, except in cases of suspension, would seem to hit the case of Thomas's appointment exactly, though even then there would have been a fair question whether the appointment were a high crime and misdemeanor. Those of the seven acquitting Republican Senators who filed opinions seem to have voted not guilty on these articles because of the "no vacancy" clause, and because a vote for conviction would have stultified their opinions on the first and eighth articles (Stanton's removal); but, even without the objectionable clause, it is extremely probable that they would still have voted not guilty on the general

ground of want of evil intent in the President's action. The only conclusion to be drawn from the conduct of the whole case is that the House was too hasty in impeaching; if it had waited patiently for some overt act to complete the eleventh article, that article would have been impregnable, and it is difficult to see how conviction could have been avoided honestly.

VII. *William W. Belknap*.—In February and March, 1876, the House Committee on Expenditures in the War Department discovered that Secretary Belknap, of that department, had for six years been receiving money for the appointment and retention in office of the post-trader at Fort Sill, Indian Territory. The total amount received was about \$24,450. The House voted unanimously to impeach him, March 2, 1876, but a few hours before the impeachment resolution was passed, Belknap resigned, and his resignation was accepted by President Grant. April 4th, the managers of the impeachment on the part of the House appeared at the bar of the Senate, and exhibited five articles of impeachment, covering the various receipts of money charged against Belknap. In his reply the defendant claimed to be a private citizen of Iowa, and denied the power of the House to impeach any one who, by resignation or otherwise, had ceased to be a "civil officer of the United States." May 4–29, the question whether Belknap was, under all the circumstances, amenable to trial by impeachment was argued and decided in the affirmative by a vote of 37 to 29; but the vote proved the hopelessness of conviction, since the minority was too large to allow a two-thirds vote of guilty. The evidence and argument on both sides continued from July 6th until August 1st, when the vote stood 36 guilty to 25 not guilty on the second, third, and fourth articles, 35 to 25 on the first, and 37 to 25 on the fifth article. The majority for conviction not being two thirds, a verdict of acquittal was entered. The vote of

the minority was given on the ground of want of jurisdiction.<sup>1</sup>

On Freedmen's Bureau see McPherson's *History of the Reconstruction*; and other authorities under preceding chapter. The first Freedmen's Bureau Bill is in 13 *Stat. at Large* (38th Cong.), 507; the second Freedmen's Bureau Bill is in 13 *Stat. at Large* (39th Cong.), 173. See also Burgess's *Reconstruction*.

On Civil Rights Bill see 14 *Stat. at Large*, 27; 16 *Wall.*, 36; 92 *U. S.*, 542; 1 *Hughes*, 536; 92 *U. S.*, 90; 100 *U. S.*, 310, 345.

On Amnesty see Appleton's *Annual Cyclopædia* (1861-73), McPherson's *Political History of the Rebellion* and *History of the Reconstruction*. For the successive proclamations above referred to, see (I.) Dec. 8, 1863, and March 26, 1864, 13 *Stat. at Large* (38th Cong.), appendix 1, vii., xi.; (II.) May 29, 1865, McPherson's *History of the Reconstruction*, 9; (III.-V.) Sept. 7, 1867, July 4 and Dec. 25, 1868, 15 *Stat. at Large*, 699, 702, 711. The act of July 17, 1862, is in 12 *Stat. at Large*, 589 (§ 13); the act of May 22, 1872, is in 17 *Stat. at Large*, 142.

On Ku-Klux Klan see *Report of the Joint Select Committee on the Condition of Affairs in the Late Insurrectionary States*, Report No. 22, Part 1, 42d Congress, 2d Session, February 19, 1872, as follows: 1:1, report of the majority (Republican); 1:101, of the sub-committee on election laws; 1:289, of the minority (Democratic); 1:589, journal of the committee; 13:35, constitution of the order; 8:452, probable origin; 2:208, 232, 11:274, 12:778, 1159 (cut), disguises; 4:653, oaths; 11:385, definition of "scalawag"; 7:764, definition of "carpet-bagger"; the most useful testimony to the reader is that of James L. Orr, South Carolina (3:1), D. C. Forsyth, J. B. Gordon, and Carleton B. Cole, Georgia (6:19, 354,

<sup>1</sup> See *Tenure of Office, Reconstruction*.

and 7:1182), Peter M. Dox, Lionel W. Day, and Wm. S. Mudd, Alabama (8:428, 590, and 10:1745), John A. Orr and G. W. Wells, Mississippi (12:697, 1147), and N. B. Forrest, Tennessee (13:3); *Ku-Klux Trials* (1871); the act of April 20, 1871, and proclamations of October 12th and 17th, are in 17 *Stat. at Large*, 13, App. iii. (Nos. 3, 4).

On Impeachments see, in general, 2 Woodeson's *Lectures*, 602; 2 Bancroft's *History of the Constitution*, 193; Tucker's *Blackstone*, App. 335; *The Federalist*, lxx.; Story's *Commentaries*, §§ 686, 740; Rawle's *Commentaries*, 200; 2 Wilson's *Law Lectures*, 165; 2 Curtis's *History of the Constitution*, 171, 397; *American Law Register*, March, 1867 (Dwight's *Trial by Impeachment*); Wharton's *State Trials*; *Trial of Alexander Addison*; 1 *Dall.*, 329; Pickering and Gardner's *Trial of Judge Prescott*; 5 Webster's *Works*, 502. (I.) 5 Hildreth's *United States*, 88, 201; 9 Cobbett's *Works*; *Trial of William Blount*; Wharton's *State Trials*, 200; 3 *Sen. Leg. Jour.*, App. (II.) 5 Hildreth's *United States*, 510; 3 Spencer's *United States*, 53; 3 *Sen. Leg. Jour.*, App.; *Annals of Congress*, 8th Cong., 1st Sess., 315–368. (III.) 5 Hildreth's *United States*, 543; 3 Spencer's *United States*, 53; 1 Garland's *Life of Randolph*, 196; Evans's *Trial of Judge Chase*; Smith and Lloyd's *Trial of Judge Chase*; 3 *Sen. Leg. Jour.*, App.; 3 Benton's *Debates of Congress*, 88, 173. (IV.) Stansbury's *Trial of Judge Peck*; 10 Benton's *Debates of Congress*, 546, 556; 11 *ib.*, 24, 124. (V.) 47–49 *Congressional Globe*; 44 *Rep. House Com.*, 37th Cong., 2d Sess. (VI.) *Impeachment of President Johnson, Published by Order of the Senate*; Schuckers's *Life of S. P. Chase*, 547. (VII.) *Impeachment of Secretary Belknap, Published by Order of the Senate*; Appleton's *Annual Cyclopædia*, 1876, 686. For the acts of May 8, 1792, Feb. 13, 1795, Feb. 20, 1863, and March 2, 1867, D. M. Dewitt's *Impeachment and Trial of Andrew Johnson*.

## CHAPTER XVI

### THE ELECTORAL COLLEGE AND ITS HISTORY

**E**LECTORAL COLLEGE is the name commonly given to the Electors of a State, when met to vote for President and Vice-President. The term itself is not used in the Constitution, nor in the act of March 1, 1792, the "bill of 1800," or the act of March 26, 1804. Its first appearance in law is in the act of January 23, 1845, which purported to empower each State to provide by law for the filling of vacancies in its "college of electors"; but it had been used informally since about 1821.

Under the Constitution and the laws the duties of the electors, or of the "Electoral College," if the term be preferred, are as follows: 1. They are to meet on the day appointed by the act of 1845, at a place designated by the law of their State. No organization is required, though the Electors do usually organize, and elect a chairman. 2. The electors are then to vote by ballot for President and Vice-President, the ballots for each office being separate. Until the adoption of the Twelfth Amendment, the electors were simply to vote for two persons, one at least an inhabitant of some other State than their own, without designating the office; and the candidate who obtained a majority of all the electoral votes of the country became President, the next highest becoming Vice-President. 3. The original ballots are the property of the State, and, if its law has directed their preservation, they are to be so disposed of. The electors are (by the law of 1792) to make three lists of

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the persons voted for, the respective offices they are to fill, and the number of votes cast for each. 4. They are to make and sign three certificates, one for each list, "certifying on each that a list of the votes of such State for President and Vice-President is contained therein." 5. They are to add to each list of votes a list of the names of the electors of the State, made and certified by the "executive authority" (the Governor) of the State. The name of the executive was left ambiguous, because several of the States in 1792 still retained the use of the title "president" of the State, instead of governor. 6. They are to seal the certificates, and certify upon each that it contains a list of all the electoral votes of the State. 7. They are to appoint by writing under their hands, or under the hands of a majority of them, a person to deliver one certificate to the President of the Senate at the seat of government. 8. They are to forward another certificate by the post-office to the President of the Senate. 9. They are to cause the third certificate to be delivered to the (Federal) judge of the district in which they assemble. The Electoral College is then dead in law, whether it adjourns temporarily or permanently, or never adjourns.

There is no penalty to be inflicted upon the electors for an improper performance of their duties, or even for a refusal to perform them at all. If a vacancy occurs among the electors, by death, refusal to serve, or any other reason, the State is empowered by the act of 1845 to pass laws for the filling of the vacancy, by the other electors, for example. If no such State law has been passed, the vote or votes are lost to the State, as with Nevada in 1864. If a general refusal of the electors of the country to serve should cause no election to result, the choice of President and Vice-President would devolve on the House of Representatives and the Senate respectively.



ELECTORS AND THE ELECTORAL SYSTEM. I. *Origin of the System.*—On no subject was there such diversity of individual opinion and of action in the convention of 1787 as on that of the mode of election of the President, for the office of Vice-President was never thought of until nearly the close of the convention's labors. The two plans, the "Virginia Plan" and the "Jersey Plan," submitted by the nationalizing and particularist elements of the convention at the opening of its work, agreed in giving the choice of the President to Congress; and Chas. Pinckney's plan, which takes the medium between them, made no provisions as to the manner of the President's election.

The debate had hardly opened when the diversity of opinion became apparent. Wilson, of Pennsylvania, wished to have a popular election by districts. Sherman, of Connecticut, wished to retain the choice by Congress. Gerry, of Massachusetts, apparently at first wished to have electors chosen by the States in proportion to population, with the unit rule; but he afterward settled on a choice of the President by the governors of the States. Hamilton wished to have the President chosen by secondary electors, chosen by primary electors, chosen by the people. Gouverneur Morris wished to have the President chosen by general popular vote *en masse*. The Virginia Plan, as amended and agreed to in Committee of the Whole, June 19th, retained the election by Congress. July 17th, popular election and choice by electors were voted down, and the choice by Congress was again approved, this time unanimously. Two days afterward, July 19th, the choice by Congress was reconsidered, and a choice by electors chosen by the State legislatures was adopted. Five days afterward, July 24th, the choice by electors was reconsidered and lost, and the choice by Congress revived. In this form it went to the Committee of Detail, was reported favorably by them August

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6th, and again referred to them unchanged August 31st. In their report of September 4th, less than two weeks before the final adjournment of the convention, this committee reported the electoral system very nearly as it was finally adopted, September 6th.

In this report of September 4th the office of Vice-President was first introduced; indeed, the creation of this office was an integral part of the electoral system. Several amendments offered on the last two days of the convention were rejected, as too late, and the electoral system was a part of the Constitution as offered to the State conventions and ratified by them. It will appear from a reconsideration that a choice by Congress was the steady determination of the convention for all but the last two weeks of its existence, excepting the five days during which it inclined toward a direct choice of electors by State legislatures; but that its final decision gave the choice of President and Vice-President to electors, appointed "in such manner as the legislatures of the States might direct."

II. *Design of the System.*—In the inquiry as to what the system was designed to be by its framers, no more is necessary than to take the plain sense of the words used in the Constitution, as cited under the fourth head of this article, supplemented in practice by the language of the *Federalist*, its authoritative exponent at the time, and by the action of the first two Congresses, in which the framers of the Constitution were numerous represented, fifteen of the thirty-eight signers being members of the first Congress, and fourteen of the second.

1. If any one thing is plain from the constitutional provisions on the subject, it is that the people, in adopting the Constitution, voluntarily debarred themselves from the privilege of a popular election of President and Vice-President, and all arguments from the aristocratic tendencies of the system are utterly irrelevant, so long

as the people do not see fit to alter essentially the language of the Constitution. The object was to avoid the very "heats and ferments" which their descendants to their sorrow experience every four years; and to this end the electors were even to meet and vote in their respective States, and not in any central location.

2. It is also plain that absolute control of the "appointment" of the electors, with the exceptions hereafter noted, was given to the State legislatures. The people refused to exercise it themselves, either in their national or in their State capacity. The words "in such manner as the legislature thereof may direct" are as plenary as the English language could well make them. In whatever manner the legislature may direct the appointment to be made,—by its own election, by a popular vote of the whole State, by a popular vote in districts, by a popular vote scrutinized by canvassing officers or returning boards, or even by appointment of a returning board or a governor without any popular vote whatever,—common-sense shows that there is no other power than an amendment of the Constitution's express language which can lawfully take away the control of the legislature over the manner of appointment. Any interference with the appointment by Congress, in particular, either directly or under the subterfuge of an "electoral commission," is evidently a sheer impertinence and usurpation, however it may be condoned by popular acquiescence in the inevitable. Even the State court of last resort can only interfere so far as to compel obedience by State officers to the will of the legislature.

3. One exception to the legislature's power, inserted to guard against executive influence, only makes the absoluteness of the rest of the grant more emphatic. The legislature is not to appoint any "Senator or Representative, or person holding an office of trust or profit under the United States," an elector. Where the legis-

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lature directs the "appointment" to be made by popular vote, it must be evident that votes cast for the appointment of a person whom the Constitution expressly bars from appointment have no existence in law; and the person for whom they were cast cannot "appoint" himself anew by resigning his office after the election and thus reviving invalid votes. How the vacancy, if any, is to be filled, must be regulated by the legislature, for the electors themselves have no such power by virtue either of their office or of the Constitution.

4. In one respect Congress could legitimately interfere for the purpose of preventing "intrigue and corruption," by naming the day on which the electors should meet and vote. Accordingly the 2d Congress, by the act of March 1, 1792, fixed the day for their voting on the first Wednesday in December, and the day of their election "within thirty-four days" preceding it; and the act of January 23, 1845, hereafter given, fixed the day for the appointment of electors. When Congress had done this, it was *functus officio*, and had no more right than a private person to violate the Constitution and its own laws, by forcing the admission of votes cast by electors on an unlawful day.

5. Congress was further given, but for more caution indirectly (in Art. IV. § 1), the power to declare the manner in which the action of the State appointing power should be authenticated, and for further caution this was only to be done "by general law." The act of 1792 provided that the votes of the electors should be authenticated by the certificate of the governor of the State. Evidently the courts of the State are the final tribunal to decide who is the governor of the State, and it would have been competent to the power of Congress to require from the State court, "by general law," an authentication of the governor's certificate. This has never been done. For Congress to omit this portion of

its duty, and leave special cases to its own special law and arbitrary, partisan decision, is evidently in flat violation of the supreme law.

6. The act of 1792 provides that the electors shall make three certificates of all their votes, two of which shall be sent to the President of the Senate, one by mail and one by special messenger, and the third shall be deposited with the (Federal) judge of the district in which they vote; that if neither of the first two shall reach its destination by the first Wednesday in January, the Secretary of State shall send a special messenger for the third to the district judge; and that, if there be no President of the Senate at the seat of government, the Secretary of State shall receive and keep the certificates for the President of the Senate. The transmission of the votes is thus very well provided for.

7. The President of the Senate is to open all the certificates in the presence of the Senate and House of Representatives, and the act of 1792 specifies the second Wednesday of February succeeding the election as the day for the performance of this duty. In pursuance of its power to provide for the authentication of State acts and records, it would be perfectly competent for Congress to so distinctly specify the necessary authentication of the electors' action and title that there could be no doubt in the mind of the President of the Senate as to which papers were certificates, and which were not. In the absence of any such general law, the President of the Senate is evidently left without any guide whatever, excepting that which must be the guide of every officer in like circumstances, his own best judgment. It was for this reason, because of the evident impossibility of the passage of a general law to meet the case in 1789, that the convention of 1787 passed the following resolution: "That the Senators and Representatives should convene at the time and place assigned [New York,

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March 4, 1789], and that the Senators should appoint a President of the Senate for the sole purpose of receiving, opening, *and counting* the votes for President." This resolution was ratified with the Constitution by the State conventions, and must be taken as expressing the contemporary intention to cover the real "*casus omissus*," viz., the neglect, refusal, or inability of Congress to pass a general law for the final authentication of certificates. The intention of the system was that the President of the Senate should canvass the votes: in accordance with a general authenticating law, if Congress would or could pass such a law; otherwise, according to his own best judgment. The members of the convention were not such bungling workmen as the modern idea of the "electoral count" would make them. They were not so foolish as to entrust the canvass to two independent agents, equal in rank, and without an arbiter in case of disagreement. They had a legislative power in Congress and the President, capable of making "*general* laws" to govern the canvass; they had a single ministerial power, in the President of the Senate, capable of carrying the general laws into effect; and they gave to each power its appropriate office. The system never contemplated the refusal of Congress to pass a general law with the purpose of using its own laches to gain partisan control over special cases as they arose.

8. Had Congress done its plain duty in the premises, and carried out the system in its letter and spirit, as the convention of 1787 intended, it is evident that that honorable body would have been reduced to its proper constitutional position as the official witness and register of the votes which have been declared by the President of the Senate in accordance with general law. The Constitution says, and need say, nothing of who shall count—only "and the votes shall then be counted"; for, if the orderly succession of steps has taken place according to

the design of the system, the "count," in its legitimate and plain meaning, can be done by tellers appointed by the House, by individual members, by the newspaper reporters, or by any one who is able to do simple addition, though the journal of the official witnesses is the authoritative and permanent record of it. It is possible to imagine an unfair and illegal decision by the President of the Senate, though no such case occurred while that officer (until 1821) maintained his proper place; and it is easy to see how hard it would be to punish him for such an offence. But it is absolutely impossible to punish Congress for a partisan use of its usurped jurisdiction; and yet that body, since it has seized control of the canvass of the votes, has hardly ever, even in appearance, made any other than a partisan use of the power, no matter what party was in the majority. The Constitution, by concentrating responsibility, found the safest place for the canvass of the votes, and it left the "count" unassigned and unguarded because there was no need of any other guard than the laws of arithmetic. All the abstruse debate as to the meaning of the simple word "count" has its origin in the determination of Congress to give it the meaning of "canvass" and then to seize control of it. For this purpose the extra-constitutional term "electoral count" has been coined.

In the endeavor to ascertain the design of the system no attention has been paid to later congressional precedents or to the opinions of political leaders in and out of Congress in the past. These may be found in great abundance in the volume called *Presidential Counts*, cited below. They are misleading, for, 1, Congress has manufactured or been led into its own precedents for the purpose of overthrowing the position of the President of the Senate, and, 2, leaders of all parties have been interested in giving an illegitimate control of the system to Congress, which they could influence, rather than to the

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proper official. But the safe guides, the plain words of the Constitution itself, and the precedents of the convention of 1787 and the earlier Congresses and Presidents of the Senate, are very easy of access, and no human ingenuity can extract from any of them a ground for any "objections," "withdrawal to consider objections," or final "voting upon disputed electoral votes" by the Congress of the United States.

The design of the system was to debar Congress from all control over the electoral system, excepting its powers to provide for uniformity of voting, and, always by "general law," for the authentication of the State's appointment of electors for the guidance of the official canvasser; to place upon one man the responsibility which the convention well knew would be divided up and disregarded by Congress; and, for further safeguard, to allow Congress to witness officially the execution of its own general law by the President of the Senate. It was unfortunate that the Constitution did not debar Congress even from this last privilege, from which alone it has gained any foothold in the canvass, and have the count conducted in the presence of the Supreme Court; for the history of the system is only a long record of gradual usurpation of ungranted powers by Congress, until at last the witness has climbed into the judge's seat, suspended the executive officer, and not only tries the law and the facts, but executes judgment as well.

III. *Perversion of the System.* 1. 1789-1821. — In this first period there is no instance of a declaration of the electoral canvass by any other power than the President of the Senate, and the only open attempt to pervert the system was the Federalist "Bill of 1800," referred to hereafter. As the certificates which the President of the Senate, in the absence of an authenticating law, decided to be valid were opened, he passed them to the tellers



appointed by the two Houses, who "counted" them, in the proper meaning of the word. The certificates of election, which were made out by order of Congress from 1797 until 1821, all contained the distinct affirmation that "the President of the Senate did, in the presence of the said Senate and House of Representatives, open all the certificates and *count all the votes* of the electors." The idea had not yet been taken up that Congress, in its capacity as a witness, had the right to "object" to the reception of particular certificates. Indeed Congress was formally petitioned to do so in 1809 (in the case of Massachusetts), and refused. No case of double or contested returns occurred, but a number of informalities are noted in the record by the tellers, which the canvassing officer seems to have considered unimportant. Even when (in 1809) he saw fit to condone so important a defect as the absence of the governor's certificate, the witnesses had or took no power to interfere.

In 1797 the Legislature of Vermont had failed to pass any law prescribing the "manner of election" of the electors, and the rejection of Vermont's vote would have elected Jefferson and defeated Adams for the Presidency. Nevertheless, Adams accepted Vermont's votes, as equity demanded, and thus committed the "enormity" of counting himself in, without any apparent thought of objection from any quarter. Had this case of Vermont happened under the modern system of congressional control, only an "electoral commission" could have decided it, for the Senate was Federalist, and the House Republican (Democratic).

In 1801 Jefferson, though in a case not so vital as that of Vermont, imitated Adams' sexample. An amendment to the Constitution was introduced in Congress in January and February, 1798, for the purpose, among others, of giving Congress the very power of decision upon "contests" which it now exercises without such an

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amendment, but this was not adopted, nor was it inserted in the Twelfth Amendment.

But although the forms of the exercise of canvassing power were kept up during this period, its spirit was growing weaker at every count. Its first, last, and persistent foe has been the Congress of the United States, which the convention strove so hard to shut out from any influence over the electors. The first principal inroad upon its essence came from the innocent and proper appointment of "tellers" by the two Houses "to examine the votes." Though these tellers had only the arithmetical powers common to any or all examiners, their quadrennial appointment gradually brought into existence the idea that the "count" at least, whatever its nature might be, was an exclusive prerogative of Congress; and the claim of power to "canvass" was only one step farther. The second attack was the organization of Congressmen of both parties into nominating bodies, whose decisions bound in advance the action of the electors, annulled their right of private judgment, and reduced them to ciphers.<sup>1</sup> When this had brought about, in 1801, its natural result of a tie between the two leading candidates,<sup>2</sup> the Twelfth Amendment was adopted requiring the electors to vote separately for President and Vice-President, but not altering the system otherwise. This constitutional recognition of the existence of parties fixed the future nullity of the electors, and their nullity gradually obscured the position of the President of the Senate.

Before 1801 no one knew positively what the vote of any elector was until the certificate was opened; after that year the votes of the electors were really known before they were cast, and several months before they were formally counted by the President of the Senate. He, therefore, while he continued to follow precedents, did

<sup>1</sup> See Caucus, Congressional.

<sup>2</sup> See Disputed Elections, I.

so in a careless and perfunctory way. In 1805 Burr merely broke the seals of the certificates, and handed them to the tellers to be read aloud by them. In 1809 the idea was first suggested openly, though not acted upon, that the Houses were met "for a special purpose, to count out the votes," instead of "to witness the canvass of the votes."

In 1817 the first "objection" to an electoral vote was offered. Indiana had been admitted as a State after the day fixed for the voting of the electors. John W. Taylor, of New York, objected to the counting of Indiana's votes, and the Houses separated to discuss the objection, as they could not do while sitting in the same room. In both Houses resolutions were offered, in the Senate that Indiana "had a right to vote in December last," and in the House that Indiana's votes "ought to be counted"; but neither House adopted them, and the votes of Indiana were counted without any further interference by Congress. But the precedent was remembered. The announcement of Indiana's vote, following the debate upon it by Congress, was accepted as *propter hoc*, as well as *post hoc*; and from that time it was evident that the last vestige, even *pro forma*, of the constitutional function of the President of the Senate was at the mercy of the first keen-witted or ignorant politician who should suggest that Congress, having successfully established its exclusive power to "count" the votes, possessed thereby the power "to decide what were votes."

The progressive changes of language in the messages from the two Houses announcing their readiness to attend the count are worthy of notice. They are as follows: (1793-1805) that they are ready to meet one another "to attend *at* the opening and counting of the votes"; (1809 and 1813) "to attend *in* the opening and counting of the votes"; (1817) "to *proceed in* opening the certificates and counting the votes," or "to proceed to

open and count the votes," the former being that of the Senate, and the latter that of the House. These changes are landmarks.

2. 1821-61.—In 1821 Missouri's votes were disputed, and for the first time in our history the power to canvass the votes was claimed for Congress. Said Henry Clay in the House: "The two Houses were called on to enumerate the votes, and of course they were called on to decide what are votes"; and again: "Would this House allow that officer [the President of the Senate], singly and alone, to decide the question of the legality of the votes?" John Randolph, indeed, denounced the new idea of congressional control, and proclaimed the electors to be "as independent of this House as this House was of them"; but his voice was unheeded. Congress had found its opportunity, and seized it, to doubly violate the Constitution, first, by usurping the control of the canvass, and second, by refusing to fulfil the charge that "the votes *shall* then be counted." The votes were not really counted. The Houses ordered the President of the Senate to declare that "if the vote of Missouri were to be counted, the result would be for A. B. — votes; if not counted, for A. B. — votes; but in either event A. B. was elected." This, with a fine irony, might be called "counting *in the alternative*"; and this was the name which was thenceforward given to the process.

Congress forgets no precedents in its own favor. It had now discovered that the President of the Senate was entrusted with no higher or more responsible duty than that of "opening" the certificates; that its own duty was to count the votes; but that the canvass was under no one's constitutional care. At first Congress contented itself with calling attention to the "*casus omissus*" which its own ingenuity had conjured up. But during all the rest of this period, while considering the various methods of providing for the *casus omissus* which are

given hereafter, Congress took care to practically cover the case by asserting and enforcing its control over the canvass.

In 1837 the vote of Michigan was announced "in the alternative." Objections were also made to the votes of six deputy postmasters who had been chosen electors, but Congress agreed to receive them. In 1857 the vote of Wisconsin was objected to, but was counted. It is often asserted that the President of the Senate counted it of his own constitutional authority. This is a mistake; his own statement is that he "disclaimed having assumed on himself any authority to determine whether that vote or any other vote was a good or a bad vote." He simply cut off debate while the two Houses were together, as he was bound to do; the members of both Houses lost their heads; no one moved for a separation of the Houses; and the vote of Wisconsin was counted irrevocably in the midst of great disorder.

At every election after 1821 the tellers assume more and more of the functions of the President of the Senate. In 1829 he abandons to them the declaration of the result; in 1845 he transfers to them the breaking of the seals; and the climax, for this period, was reached in 1861, when the House actually appointed a committee to report a mode of "canvassing" the votes, inserting a new word instead of "examining," which had been used since 1793.

3. 1861-81.—With the canvass of 1865 begins the period when Congress, without pausing to debate, began the exercise of an absolute control over the votes of the electors. It did so by refusing to pass the general law which it was empowered to pass, leaving individual cases to be dealt with as party needs might demand. February 6, 1865, the two Houses, both under Republican control, passed the twenty-second joint rule, which provided that any vote to which objection should be made should be

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rejected, unless accepted by concurrent vote of both Houses. This did not require the President's signature, and seems to have been put into this shape for that reason. No previous American Congress has ever been guilty of a more open and unnecessary usurpation than this. The act of February 8th more fairly covered the case by providing that the seceding States named were in such condition on Nov. 8, 1864, that no valid election was held therein, and that no votes from them should be received. Even here the vicious propensity of Congress to special legislation was apparent. Senator Collamer's substitute, giving no names of States, but referring in proper and general terms to "any State declared to be in insurrection by virtue of the act of July 13, 1861," was rejected.

Under the continuing twenty-second joint rule the votes of Louisiana were counted in 1869, and by a further concurrent resolution the votes of Georgia were counted "in the alternative." In 1873, under the twenty-second rule, the vote of Louisiana was rejected by a concurrent vote, the vote of Arkansas and three votes of Georgia for Horace Greeley (dead) were rejected by a non-concurrence, and the votes of Texas and Mississippi were accepted. January 20, 1876, the House having become Democratic, the Senate repealed the twenty-second joint rule. The two Houses were therefore left to meet the election of 1876<sup>1</sup> without any law on the subject.

A very brief consideration of the facts under which the dispute as to the election of 1876 arose will show that no such dispute could have arisen if Congress had fulfilled its plain duty under the Constitution, 1, by passing a "general law," for the full authentication of the electoral votes from the States to the President of the Senate, and 2, by keeping its own hands off the canvass. The "count," in its strict and proper meaning, might then

<sup>1</sup> See Disputed Elections, IV.

have been left safely to the operations of the first rule of arithmetic. But this was not the time for a great constitutional reform; the fifty years' usurpation by Congress of power to decide each case arbitrarily as it arose had left the country with no law to rely upon; the passage of a general law by Congress was then an impossibility; and it is matter for congratulation that the lottery which finally decided the presidential election was at least decently clothed in the forms of law.<sup>1</sup>

Of the utter illegality of the electoral commission, of the lack of power in Congress to take the appointment of the electors away from the States, there can be no doubt; but there can be no more doubt, on the other hand, that Congress committed no greater illegality in passing the electoral commission act than in assuming to "canvass" the votes in 1865, 1869, and 1873, under the twenty-second joint rule. President Hayes was just as illegally "counted in" as Presidents Lincoln and Grant, and no more so than they.

In 1880 Congress again counted the vote of Georgia "in the alternative." It had not yet, nor has it yet in 1882, passed any general law to govern the President of the Senate in his canvass of the votes, and apparently intends still to persist in its traditional policy of waiting for disputed electoral votes, then claiming that there is no general law to cover the case, and finally usurping the power to decide.

IV. *Legal Limitations.*—The constitutional provisions in regard to the electors will be found<sup>2</sup> under Article II., § 1, Article IV., § 1, and Amendment XII. In pursuance of its powers to secure uniformity of voting, and to provide for authentication of State records, Congress has enacted various provisions to govern the action of the electors. The act of March 1, 1792, provided: 1, that the electors should be appointed in each State in

<sup>1</sup> See Electoral Commission.

<sup>2</sup> See Constitution.

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1792, and every four years thereafter, within thirty-four days preceding the first Wednesday in December; 2, that they should meet and vote on the first Wednesday in December, and transmit their votes as heretofore described; 3, that the "executive authority" of each State should certify three lists of the electors, to be annexed by them to their certificates; 4, that the Secretary of State should send for the third list, if the first two were not received before the first Wednesday in January; 5, that Congress should be in session on the second Wednesday in February, "that the certificates shall then be opened, the votes counted, and the persons who shall fill the offices of President and Vice-President ascertained and declared agreeably to the Constitution"; 6, that the certificates shall be delivered to the Secretary of State in case there is no President of the Senate at the capital; 7, that the electoral messengers shall receive twenty-five cents per mile by the most usual road; 8, that a fine of \$1000 shall be inflicted for neglect to deliver the lists; the remaining sections (9-12) relate to the succession to the Presidency. The act of January 23, 1845, fixed the day for the appointment of the electors as the Tuesday after the first Monday of November, and empowered each State to provide for filling vacancies in its "college" of electors, and to appoint a subsequent day for a choice of electors when the first election has not resulted in a choice.

V. *Special Enactments*.—1. The act of March 26, 1804, was passed because of the doubt whether the proposed Twelfth Amendment would be ratified in time to control the approaching presidential election. It permitted electors who, at their time of meeting, had not been notified of the ratification of the amendment, to vote twice, once according to the original mode of the Constitution, and once according to the amendment, with the proviso that only those certificates should be finally valid which should



be in accordance with the Constitution as it should be in force on the day of voting. This, though it seems to have been legitimate, as a "general law," was made obsolete by the ratification of the amendment before the election.

2. It has always been difficult for the upholders of congressional control over the canvass to give a name to their manner of action. They do not act as a legislative body, for the President's veto power is absent; nor as a joint meeting, for the separate existence and organization of the two Houses is carefully preserved; and yet, if their independence is maintained, their control of the canvass is manifestly and absolutely dependent on the single chance of the political agreement of the two Houses, for if they are controlled by different parties they cannot agree in the canvass of disputed votes. No man can say, therefore, whether the two Houses are to "agree" in accepting or in rejecting a disputed vote; and this one consideration is enough to stamp a congressional "canvass" as a hopeless absurdity. The strong probability<sup>1</sup> that two of the late seceding States would attempt to reorganize themselves without congressional control caused the introduction and passage, February 6, 1865, of a "joint rule," the twenty-second, which described the manner in which the two Houses intended to canvass the votes. It provided, outside of the directions for organization, that "no vote objected to shall be counted except by the concurrent votes of the two Houses," thus practically giving the power to reject a State's vote not even to "Congress," but to either House—an absurdity which is only one of the least in the idea of a congressional canvass. Under this twenty-second joint rule the electoral votes were canvassed in 1869 and 1873, but it was abolished in 1876, as above stated, when the two Houses had fallen to opposite parties.

<sup>1</sup> See Reconstruction.

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3. The act of February 8, 1865, enacted that no electoral votes should be received or counted from the States of Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee. The reason assigned in the preamble was, that these States had rebelled against the Government and were in such condition on November 8, 1864, that no valid election was held therein. President Lincoln signed it "in deference to the views of Congress," disclaiming "any opinion on the recitals of the preamble."

4. The count of 1877 brought the touchstone which, when applied, will always expose the inherent fallacy of a canvass by two independent bodies. The Senate was Republican and the House was Democratic. The difficulty was evaded in this case by the passage of the Electoral Commission Act. It passed the Senate, January 25, 1877, by a vote of 47 (26 Democratic, 21 Republican) to 17 (1 Democratic, 16 Republican); the House, January 26th, by a vote of 191 (159 Democratic, 32 Republican) to 86 (18 Democratic, 68 Republican); and was approved January 29th. The germ of its idea will be found in the "Bill of 1800," hereafter referred to. Both laws are open to the same fatal objection. They are not the "general laws" which Congress is empowered to pass touching the authentication of State records, including electoral appointments; they do not come, directly or indirectly, under any power which Congress is authorized to exercise; and they are simply refusals by Congress to give up permanently its usurpation of the power to canvass, even under circumstances which show that the exercise of the power may at any moment become impossible. The fiction that Congress was a more trustworthy canvassing agent than the President of the Senate was long ago exploded; the experience of 1877 shows that extra-congressional agents are no better than Congress; and the lesson of experience would seem to be that the

canvass should be restored to the only agent from whom a decision, and a prompt decision, is always certain—the President of the Senate. Nevertheless, all the remedies now (1882) under consideration retain the vice of permitting “objections” to electoral votes and decision, in one form or other, by Congress.<sup>1</sup>

VI. *Proposed Legislation.*—1. *The Bill of 1800.* January 23, 1800, while the Federalists controlled both Houses of Congress, Senator James Ross, of Pennsylvania, introduced a bill to regulate the electoral count. It provided, in brief, for the formation of a “grand committee” of six Senators, six Representatives, and the Chief Justice, with power to examine and decide *finally*, in secret session, all disputes and objections as to electoral votes. Of the four members of the convention which framed the Constitution who were then Senators, the bill was voted for by only one, Jonathan Dayton, who had taken no real part in the deliberations of the convention itself. The other three, Charles Pinckney, Langdon, and Baldwin, denounced and opposed the bill to the end. Pinckney, in his very able speech of March 28, 1800, distinctly declared the design of the Constitution to have been that “Congress shall not themselves, even when in convention, have the smallest power to decide on a single vote.” The bill passed the Senate the same day, by a vote of 16 to 12. In the House, John Marshall, Bayard, and other Federalists united with the Democrats in emasculating the bill by giving the “grand committee” power only to take testimony and report it to the two Houses without expressing any opinion on it; the return was still to be accepted, unless both Houses concurred in rejecting it; and no provision was made for double returns. May 8th, the Senate amended by providing that a return objected to should be rejected unless both Houses con-

<sup>1</sup> For the important features of the act, see Electoral Commission; for the action of Congress under it, see Disputed Elections, IV.

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curred in admitting it. Both Houses refused to recede, and the bill was lost.

2. *The Benton Amendment*.—December 11, 1823, Senator Thomas H. Benton introduced an amendment to the Constitution providing that each legislature should divide its State into electoral districts; that the voters of each district should vote "in their own proper persons" for President and Vice-President; that a majority in an electoral district should give a candidate the electoral vote of the district; that the returning officers should decide in case of a tie vote in any district; and that, if no candidate should have a majority of all the electoral votes, the House should choose the President, and the Senate the Vice-President, as at present. The amendment at this session was not acted upon.

Benton subsequently changed it by providing for a second popular election in case of a tie, and in case of a further tie, for the choice of the person having the greatest number of votes in the greatest number of States. It was introduced in this form, June 15, 1844, but was not acted upon.

3. *The Van Buren and Dickerson Amendments*.—These were introduced in the Senate, the latter December 16th, by Mahlon Dickerson, of New Jersey, and the former December 24, 1823, by Martin Van Buren, of New York. Both aimed to change the Twelfth Amendment mainly by requiring the electors to be chosen by districts, instead of by general ticket. In the case of a tie vote the Dickerson amendment left the choice of President to the two Houses in *joint* meeting, and of Vice-President to the Senate; the Van Buren amendment required the electors to be immediately convened by proclamation of the President, and to choose between the candidates having an equal number of votes, the final choice, in case of another tie, being left as at present. Neither amendment provided for disputed or double returns; and neither was acted upon.

4. *The McDuffie Amendment*.—This was introduced in the House, December 22, 1823, by George McDuffie, of South Carolina, as chairman of a select committee on the subject. It provided that electors should be chosen by districts assigned by the legislatures, or by Congress in default of action by any legislature; that the votes should be opened and counted as at present; that in case of a tie the President of the Senate by proclamation should reconvene the electors; that the electors should then choose between the tie candidates; that, in the event of another tie, the two Houses of Congress, voting individually and not by States, should choose the President; that, if no choice was made on the first ballot, the lowest candidate on the electoral list should be dropped at each ballot until but two remained; that, in case of a final tie, the candidate who had the highest vote at the first, or, if not at the first, at the second meeting of the electors, should be chosen; that, if neither of these provisions applied, the two Houses should continue balloting until a President was chosen; and that the Vice-President should be chosen by the Senate, in case of a tie vote for that office. This amendment was debated during the session, but was not acted upon. April 1, 1826, in the House, McDuffie obtained a vote on his resolutions. The first, that the Constitution ought to be so amended as to keep the election of President and Vice-President from Congress, was carried by a vote of 138 to 52; the second, in favor of the "district system" was lost by a vote of 90 to 102; and the subject was dropped.

5. *The Van Buren Bill*.—April 19, 1824, the Senate passed Van Buren's bill, providing that, if objection were made to a return, the return should be counted unless the Houses, voting separately, concurred in rejecting it. The bill was not acted on by the House.

6. *The Gilmer Amendment*.—In each of his messages President Jackson recommended to Congress the passage

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of an amendment giving the choice of President and Vice-President to the people. January 31, 1835, in the House George R. Gilmer, of Georgia, chairman of a select committee on the subject, reported an amendment. It combined the direct choice by the people, and the second popular election in case of a tie, of the Benton amendment, with a provision that, in case of the death of the successful candidate at the second popular election, the Vice-President "then in office" should be President. In case of a tie at the second popular election the President was to be chosen by the House and the Vice-President by the Senate as at present. This amendment was not acted upon.

7. *The Morton Amendment.*—May 28, 1874, Senator Oliver P. Morton, of Indiana, chairman of the Committee on Elections, reported an amendment in seven sections. It provided that the States should be divided into electoral districts, and that a majority of the popular vote of a district should give a candidate one "presidential vote"; that the highest number of presidential votes in a State should give a candidate two votes at large; that the highest number of presidential votes in the country should elect a candidate; that an equal division of the popular vote in a district should nullify the presidential vote of the district, an equal division of the presidential votes in a State should divide the two votes at large, or should nullify them, if there was an equal division between three candidates; that the Vice-President should be chosen in the same manner; that Congress should provide rules for the election, and tribunals for the decision of contests; and that districting should be done by State Legislatures, but that Congress might "make or alter the same." In debate it was understood that Congress could either adopt the existing courts as tribunals, or create new ones for the purpose of deciding contests. The amendment was debated through the winter of 1875, but was not finally acted upon.

8. *The Morton Bill*.—February 25, 1875, Senator Morton introduced a bill to govern the electoral count. It followed the twenty-second joint rule, except that it provided that, if objection were made to any return, that return should be *counted*, unless rejected by a concurrent vote of both Houses, and that, in case of a double return, that return should be counted which the two Houses, acting separately, should decide to be the true one. This was the first provision in our history for double returns. In debate it was agreed that the vote of the State would be lost in case of a disagreement of the Houses on a double return. The bill was passed by the Senate, and not acted upon by the House. At the next session it was brought up again, December 8, 1875, debated, until March 24, 1876, and then passed by a party vote of 32 to 26 Democrats in the negative. The same day a motion to reconsider was entered by a Democratic Senator, and carried April 19th. It was then debated until August 5th, and dropped. Had it become a law it would have seated the Democratic candidates at the following election.

9. *The Buckalew Amendment*.—This, drawn up by ex-Senator Charles R. Buckalew, of Pennsylvania, was introduced in the House February 7, 1877, by Levi Maish, of the same State. It provides for direct popular vote by electoral districts, and assigns to each candidate a proportion of the State's electoral vote corresponding to his proportion of the State's popular vote. It has never been acted upon.

10. *The McMillan System*.—This system contemplates the nomination of presidential candidates by State legislatures, each nomination to specify whether it shall be classed in "the first presidential canvass," or in "the second presidential canvass"; an election by a majority of the general popular vote; and, in default of a popular majority, a second general election, to be confined to the

highest candidate in each "presidential canvass." This last term is another phrase for political party, and its introduction is intended to prevent the possible second election from being confined to two candidates of the same party. The system has only been unofficially proposed in Mr. McMillan's work cited at the close of this chapter.

11. *The Edmunds Bill.*—This bill to regulate the electoral count, introduced in 1878 by Senator George F. Edmunds, of Vermont, provided that the electors should be appointed on the first Tuesday of October and should meet and vote on the second Monday of the following January; that each State "may provide" by law for the trial of contests, and the decision shall be conclusive of the lawful title of the electors; that, if there is any dispute as to the lawfulness of the State tribunal, only that return shall be counted which the two Houses, acting separately, shall concur in deciding to be supported by the lawful tribunal; that, if there are double returns from a State which has not decided the title of the electors, only that return shall be counted which the two Houses, acting separately, shall decide to be legal; and that, if any objections are made to any single return, it shall not be rejected except by the affirmative vote of both Houses. The bill was not passed. It was introduced again, December 19, 1881, by Senator George F. Hoar, of Massachusetts, but has not yet (1882) been passed. The bill would be perfectly in accord with the design of the electoral system if its code of rules had been still more carefully drawn and made obligatory upon the President of the Senate alone; but, by reserving to the two Houses, even concurrently, the power at their own partisan pleasure to adjudicate special cases, and even over-ride their own previous enactments, it retains the vicious principle which has been the source of all our difficulties. The difficulty lies, not in the electoral system, but in the



determination of Congressmen of both Houses, and of all parties, to meddle with a duty which the Constitution distinctly intended to free from their control.

VII. *Incidental Features.*—In 1789 no electoral votes were cast by New York, Rhode Island, or North Carolina. The two latter States had not yet ratified the Constitution. In New York the Anti-Federalists of the Assembly wished to choose electors by joint ballot; the Federalists of the Senate insisted upon having half the electors, and no electoral law was passed. Electors were generally chosen by the legislatures in all the States until about 1820–24. In Maryland, North Carolina, and Virginia they were chosen by popular vote in electoral districts. In Massachusetts the people of each congressional district nominated three electors, of whom the legislature chose one, and the two electors at large. Occasionally the district system was adopted for a time by other States, but was altered as party interest demanded, as in 1812, when the Democratic Legislatures of Vermont and North Carolina and the Federalist Legislature of New Jersey repealed the law for the choice of electors by popular vote just before the day fixed for the election, and assumed the choice themselves. The following Legislature of North Carolina re-established the district system, and recommended the adoption of the amendment subsequently known as the “Benton Amendment.”

In 1800 the Democratic Assembly of Pennsylvania wished to choose electors by joint ballot, in order to secure the whole number, while the Federalist Senate insisted on having seven of the fifteen electors. A bill to that effect was passed, December 1, 1800, just in time to enable the electors to vote, December 3d. The “Bill of 1800,” heretofore mentioned, was aimed at Pennsylvania’s vote. In South Carolina, in 1800, the legislature which was to choose the electors was extremely doubtful,

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even after its meeting. The Democrats offered to compromise on Jefferson and Pinckney, which would, as it proved, have made Pinckney Vice-President; but the Federalists stood to their whole ticket and lost it, 83 to 68. At the count of the votes in February, 1801, Jefferson, the President of the Senate, counted the votes of Georgia for himself and Burr, as equity demanded, although the tellers called his attention to the absence of any certificate that the electors *had* voted for them. The votes of Georgia, however, were not essential to the result.<sup>1</sup>

In 1816 three electors in Maryland and one in Delaware, belonging to the almost extinct Federal party, neglected to vote, and in 1820 Pennsylvania, Tennessee, and Mississippi each lost an elector by death.<sup>2</sup> One elector in New Hampshire voted for John Quincy Adams for President, so that Monroe did not have a unanimous vote. Missouri, whose final admission only dated from August 10, 1821, chose presidential electors in November, 1820, and their votes were "counted in the alternative," as before mentioned.

In 1824 the electors made no choice.<sup>3</sup> The electors were now chosen by popular vote in all the States excepting Delaware, Georgia, Louisiana, New York, South Carolina, and Vermont, where they were still chosen by the legislatures. In 1828 and subsequent years electors were chosen by popular vote in all the States excepting South Carolina, where the legislature chose them until 1868.

Michigan, which was not admitted until January 26, 1837, chose presidential electors in November, 1836, and their votes were "counted in the alternative." No choice of a Vice-President was made by the electors.<sup>4</sup> In 1856

<sup>1</sup> For the tie vote and its results, see Disputed Elections, I.

<sup>2</sup> See Electoral College.

<sup>3</sup> See Disputed Elections, II.

<sup>4</sup> See Disputed Elections, III.

the Wisconsin electors were prevented by a violent snow-storm from meeting and voting on the day fixed by law (December 3d), and met and voted December 4th. In counting the votes, February 11, 1857, objection was made to Wisconsin's vote. The President of the Senate, Senator Mason, of Virginia, decided debate to be out of order; no motion to separate was made; and the vote of Wisconsin was counted. In 1865 the President of the Senate, "in obedience to the law of the land" (the act of 1865), refused, when requested, to open the certificates sent by Louisiana and Tennessee.

In 1869 the votes of Mississippi, Texas, and Virginia, which had not been reconstructed, were not received, and the votes of Louisiana were counted. The votes of Nevada were objected to, but the President of the Senate refused to entertain the objection, on the ground that it was made too late. Georgia, which had been reconstructed, had proceeded to deny the eligibility of negroes to the legislature. Her electors had voted on the *second* Wednesday in December, as required by State law passed under the Confederacy, instead of the *first* Wednesday, as required by law, and on this ground it was known that objections would be made to their votes. It was therefore arranged by joint resolution to "count them in the alternative." Nevertheless, objection was made to Georgia's vote. It was sustained by the House, and overruled by the Senate, and the President of the Senate decided that they must be counted in the alternative, decided debate out of order, and refused to allow an appeal from his decision. The vote was finally made up in the midst of disgraceful disorder.

In 1873 double returns appeared for the first time, from Louisiana and Arkansas. The two Houses concurred in counting the votes of Texas (objected to for want of the Governor's certificate), and of Mississippi (objected to for want of a certificate that the electors had voted by ballot),

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and in rejecting the vote of Arkansas, for want of the Governor's certificate. By disagreement of the two Houses three votes of Georgia for Greeley (dead), and the entire vote of Louisiana were rejected.

In 1877 the result of the electoral vote was disputed. The facts and mode of settlement are given elsewhere.<sup>1</sup> In 1881 the electoral votes of Georgia, which were still cast on the wrong day, were "counted in the alternative."

**DISPUTED ELECTIONS.**—When the electors have failed to give any one a majority of all the votes, the House of Representatives, voting by States, and each State having one vote, was empowered by the original terms of the Constitution to choose a President from the *two* highest candidates on the list. Amendment XII. enlarged the limits of choice to *three* candidates, and directed the Senate in like case to choose a Vice-President from the two highest candidates for that office.<sup>2</sup> There have been three such disputed presidential elections in our history, and one (1876) in which the majority of electoral votes was disputed.

I. (1800).—In the election of 1796 it had been generally agreed by the leading men of both parties, as a concession to the personal dignity and feelings of the candidates, that Jefferson and Burr, and Adams and Pinckney, should receive, as far as possible, equal consideration from the electors. The independent judgment of the electors prevented the faithful observance of this agreement, and it was more formally renewed by a congressional caucus of each party in 1800, apparently without reflection that a rigid adherence to it by both parties would certainly result in no choice, since only the highest candidate on the list became President. Both parties adhered to the agreement, except that one Federalist

<sup>1</sup> See Electoral Commission ; Disputed Elections, IV.

<sup>2</sup> See Constitution, III.; Executive.

elector (in Rhode Island) was acute enough to give his second vote to John Jay. Burr, it has been charged, on doubtful authority, endeavored in like manner to gain one vote on Jefferson in New York. February 11, 1801, Jefferson and Burr were found to have a tie vote, 73 each, and the House, in which the Federalists had a majority both of members and of States, proceeded to choose between the two Democrats.

In anticipation the House had settled, February 9th, the rules for balloting, which became precedents for 1824. Their most important provisions were as follows:

“ 2. That the Senate should be admitted. 3. That the balloting should not be interrupted by any other business. 4. That the house should not adjourn until a choice was made. 5. That the balloting should be in secret session. 6. That the Representatives should sit by States; that each State should ballot separately, cast its ballot in duplicate, marked with the name of its choice or with the word ‘divided,’ into its own ballot box; that two general boxes should be provided, the duplicate State ballots going into separate boxes; that each State should have a teller; that, if the results of the count of the two boxes tallied the result of the ballot should be announced, but that, if the two reports disagreed, the ballot should be null and void. 7. That, as soon as any person had a majority of the State ballots, the speaker should announce his election.”

Partly to balk the evident desire of the Democrats for Jefferson, and partly from an idea that Burr would be less dangerous to the commercial interests of the country, the Federalist caucus had determined to vote for Burr for the Presidency. Had all the Federalist representatives obeyed the caucus, Burr would have been elected President at once; but the single Federalist member from Georgia, one Federalist member from Maryland, and one from North Carolina, whose representatives were evenly divided, decided to conform to the wishes of their con-

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stituents, and vote for Jefferson. This gave him the State vote of Georgia and North Carolina, and divided that of Maryland. Jefferson was thus sure of eight States, all those south of New England except Delaware, Maryland, and South Carolina; and Burr of six States, Delaware, South Carolina, and all New England except Vermont, which, with Maryland, was divided. There was thus still no choice by the House, Jefferson lacking one of a majority of the sixteen States. Bayard, of Delaware, Morris, of Vermont, and Craik and Baer, of Maryland, while yielding to the decision of the Federal caucus and voting for Burr, very early came to a common agreement that, as any one of them, by voting for Jefferson, could at any time give him a majority of the States, they would not allow the balloting to be prolonged to any dangerous extent.

The balloting continued for a week, the House having nineteen ballots on Wednesday, February 11th; nine on Thursday, February 12th; one on Friday, February 13th; four on Saturday, February 14th; one (the thirty-fourth) on Monday, February 16th; but all with the same result, eight States for Jefferson, six for Burr, and two divided. This protracted uncertainty was enlivened by frequent caucusses of both parties, by the presence of sick members who had been carried into the House in their beds and remained there to insure their votes, and by the angry and exaggerated rumors which naturally floated out from the secret sessions to the people outside.

The Federalists were charged (and justly in the case of some of them) with a design to prolong the balloting until the expiration of Adams's term, March 3d, and then either to leave the Government to the strongest and most active, or, by special act, to give it in trust to the Federalist Chief Justice, John Marshall, who was then also acting as Secretary of State. In any such event the Democrats, after debating a proposition to call an extra

session of the next Congress in March by a proclamation signed by Jefferson and Burr, in one of whom the presidential title was vested, seem to have decided to have the Middle States seize the capital by a militia force and call a general convention of the States to provide for the emergency, and revise the Constitution. For all this nervous agitation there was no occasion while Bayard was in the House, and exerted his influence, as he always did, for good; but it was very fortunate that at this session Congress had changed its meeting-place from a large city to the little village of Washington, and had thus avoided all danger of interference by mobs.

For seven days the House remained in session, nominally without adjournment, though, after sitting out the first night, the resolution not to adjourn was evaded by taking recesses as convenience demanded. Monday, February 16th, the four associate Federalists decided that the party experiment had gone far enough, and that, if a guarantee for the civil service could be obtained from Jefferson, Burr should have but one more ballot. Tuesday, February 17th, the thirty-fifth ballot took place with the usual result, and, an hour afterward, the thirty-sixth ballot began. Jefferson had given the necessary guarantee through a friend; Morris, therefore, by absenting himself, allowed his Democratic colleague to cast the State vote of Vermont; Craik and Baer, by casting blank ballots, made Maryland Democratic, and Jefferson received ten State votes out of sixteen and was elected. Delaware and South Carolina voted blank ballots. The Vice-Presidency devolved on Burr, for whom the New England States, except Vermont, voted to the end. Jefferson entered office without any feelings of gratitude to the Federalists who had given him the position, but with great irritation against them for having voted blank instead of voting directly for him, and his account is to be taken with caution.

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II. (1824).—The dissolution of the Federal party after 1815 had left nominally but one political party, the Democratic-Republican, in the United States. But the debates in Congress alone will show that there was still the abiding difference between those voters in the North who wished to construe the Constitution broadly, for the benefit of commerce and a strong Federal Government, and those in the South and West who wished to construe the Constitution strictly, for the benefit of agriculture and the conservation of the State governments, and that the all-prevailing Democratic-Republican party was really divided into two factions, strict constructionist and broad constructionist. In 1820 and 1821 these two branches of the party opposed each other, though not under distinct party names, in animated contests for the Speakership of the House.

The want of regularly organized parties, with recognized principles, only resulted in the degradation of the presidential election of 1824 into a personal contest between John Quincy Adams, Secretary of State, Henry Clay, Speaker of the House, William H. Crawford, Secretary of the Treasury, and Andrew Jackson, who, when nominated by his State legislature, had resigned his position as Senator and become a private citizen of Tennessee. Of these the two first named were broad constructionists, Federalists in reality, though they would have scouted the name, and the two last named were strict constructionists. In the presidential election Albert Gallatin, who had been nominated by the congressional caucus for the Vice-Presidency, had no votes, being ineligible, and John C. Calhoun, of South Carolina, was generally supported by the friends of all the presidential candidates. The electors failed to choose a President, and the duty of choosing between Jackson, Adams, and Crawford, the three highest candidates on the list, devolved upon the House. In balloting, the rules of the



House in 1801 were adopted, after much opposition to the exclusion of the public. Clay standing fourth on the list, was ineligible, and the whole struggle in the House turned on the success of the other candidates in winning the Clay vote. This, very naturally, went to Adams, though only as a choice of evils, and the result of the first ballot, February 9, 1825, was thirteen States for Adams, seven States for Jackson, and four States for Crawford. Adams thus became President.

Jackson had received a plurality of the popular and the electoral vote, and the general feeling that the working of the Constitution had done him an injustice aided greatly in carrying him triumphantly into the Presidency four years after.<sup>1</sup>

A more patent result in politics was the charge, first advanced by George Kremer, of Pennsylvania, in the House, and by his own confession without one tittle of evidence, that a "corrupt bargain" had been made between Adams and Clay, by which the former was to receive the Clay vote in the House, and the latter the position of Secretary of State in Adams's Cabinet. Adams's subsequent nomination of Clay to this very position was, to the Democratic mind, incontrovertible proof of this corrupt union of New England and Kentucky, "of the Puritan and the black-leg." This charge lay like a stumbling-block in Clay's path, eluding, however, his eager search for an authority until 1827, when it was formally reiterated by Jackson himself, on the authority of James Buchanan, Representative from Pennsylvania, who at once declared Jackson's impression "erroneous." And yet the charge was renewed quadrennially for twenty years after the only authority ever alleged had fully repudiated any responsibility for it.

III. (1836).—February 8, 1837, the electors having failed to choose a Vice-President,<sup>2</sup> the Senate, from the

<sup>1</sup> But see Democratic Party.

<sup>2</sup> See Democratic Party, IV.

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two highest candidates on the list, chose Richard M. Johnson by a vote of 33 to 16 votes for Francis Granger.

IV. (1876).—The origin of the dispute over the result of the presidential election of 1876 may be found in the constitutional provision that each State shall appoint electors "in such manner as the legislature thereof may direct." Of the 369 electors, 184, one less than a majority, had, without question, voted for the Democratic candidates, Tilden and Hendricks; but at least twenty of the remainder were disputed.

In the three Southern States of Florida, South Carolina, and Louisiana, the legislatures had directed the counting of the popular vote for electors to be done by returning boards, with plenary power to cast out the entire vote of any county or parish in which fraud or force had vitiated the election. By exercising this power the returning boards of Florida and Louisiana had converted an apparent Democratic popular majority into an apparent Republican majority, and given certificates to the Republican electors. It was known before February, 1877, that double returns had been sent by the Democratic and Republican electors of the three States named, and from Oregon.<sup>1</sup> It was impossible to give the votes in the alternative, for, by a single vote from any of the States above named, Tilden and Hendricks would be seated. By the twenty-second joint rule the Democratic House could have thrown out all the doubtful States and given the Democratic candidates a majority; but the Republican Senate had repealed the joint rule, January 20, 1876, and some of its members began to assert the arbitrary and absolute power of the Vice-President to "decide which were legal votes."

Under these circumstances the Electoral Commission was created, whose decision was only to be reversed by concurrent vote of both Houses. As each decision of

<sup>1</sup> See Electoral Commission, for the facts in this case.

the commission in favor of the Republican electors was announced to the two Houses, the Senate voted to sustain it, and the House to reject it, by strict party votes, and the commission's decision held good. In each of the States of Michigan, Nevada, Pennsylvania, Rhode Island, and Vermont, one elector was objected to as holding an office of trust or profit under the United States; but both Houses concurred in admitting all these votes.

After a session lasting from February 1, 1877, until 4.10 A.M., of March 2d, the vote was finally announced as 185 to 184 for the Republican candidates, Hayes and Wheeler.

**THE ELECTORAL COMMISSION.**—The act which created this body, which had hitherto been unknown to the laws of the United States, but whose idea seems to have been borrowed from the extra-legislative commissions of Great Britain, was approved January 29, 1877. It is only necessary here to give the first three paragraphs of section second, the rest being matter of detail. Section first provides for the joint meeting of the two Houses, the opening of the electoral votes, the entrance upon the journals of the votes to which no objection should be made, and the separate vote by each House on single returns from any State to which objection should be made, with the proviso that no such single return should be rejected except by concurrent vote of both Houses.

For double or multiple returns the Electoral Commission was provided, as follows:

“ § 2. That if more than one return, or paper purporting to be a return, from a State shall have been received by the President of the Senate, purporting to be the certificates of electoral votes given at the last preceding election for President and Vice-President in such State (unless they shall be duplicates of the same return), all such returns and papers shall be opened by him in the presence of the two houses,

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when met as aforesaid, and read by the tellers, and all such returns and papers shall thereupon be submitted to the judgment and decision, as to which is the true and lawful electoral vote of such State, of a commission constituted as follows, namely: During the session of each House on the Tuesday next preceding the first Thursday in February, 1877, each House shall, by *viva voce* vote, appoint five of its members, who with the five associate justices of the Supreme Court of the United States, to be ascertained as hereinafter provided, shall constitute a commission for the decision of all questions upon or in respect of such double returns named in this section."

The section proceeds to specify, though without directly naming them, four justices, those assigned to the 1st, 3d, 8th, and 9th circuits, and directs them to select a fifth justice to complete the commission, which should proceed to consider the returns "with the same powers, if any, now possessed for that purpose by the two Houses acting separately or together." It is concluded elsewhere that the Houses had no such powers, separately or together, and could delegate no such powers to a commission. The question of the legality of the commission itself will therefore not be revived in this article. The commission was to decide by a majority of votes, and its decisions were only to be reversed by concurrent action of both Houses.

As the Senators appointed on the commission were three Republicans to two Democrats, the Representatives three Democrats to two Republicans, and the justices were so selected as to be two Democrats to two Republicans, it is evident that the fifth justice was to be the decisive factor of the commission. The radically evil feature of the act was, therefore, that it shifted upon the shoulders of one man a burden which the two Houses together were confessedly incompetent to dispose of.

The fifth justice selected was Joseph P. Bradley, of the

fifth circuit, and the commission, when it met for the first time, January 31, 1877, was constituted as follows (Republicans in Roman, Democrats in italics): Justices: *Nathan Clifford*, first circuit, president; William Strong, third circuit; Samuel F. Miller, eighth circuit; *Stephen J. Field*, ninth circuit; Joseph P. Bradley, fifth circuit. Senators: George F. Edmunds, Vt.; Oliver P. Morton, Ind.; Fred. T. Frelinghuysen, N. J.; *Thos. F. Bayard*, Del.; *Allen G. Thurman*, O. Representatives: *Henry B. Payne*, O.; *Eppa Hunter*, Va.; *Josiah G. Abbott*, Mass.; Jas. A. Garfield, O.; Geo. F. Hoar, Mass. *Francis Kernan*, N. Y., was substituted, February 26th, for Senator Thurman, who had become ill. The Bar, besides the ablest lawyers of both parties in both Houses, who appeared as objectors to various returns, was composed of O'Connor, of New York; Black, of Pennsylvania; Trumbull, of Illinois; Merrick, of the District of Columbia; Green, of New Jersey; Carpenter, of Wisconsin; Hoadley, of Ohio; and Whitney, of New York, on the Democratic side; and Evarts and Stoughton, of New York, and Matthews and Shellabarger, of Ohio, on the Republican side. As the double returns from the four disputed States came to the commission, they were necessarily decided in alphabetical order: Florida, Louisiana, Oregon, and South Carolina; but the principle settled in the case of Florida practically decided all the cases, and longer space will be given to it.

I. *Florida*.<sup>1</sup>—Three returns from Florida were sent to the commission, February 2d, by the joint meeting of the two Houses: 1, the return of the votes of the Hayes electors, with the certificate of the Governor, Stearns, annexed, under the decision of the State returning board, which had cast out the vote of certain polling places; 2,

<sup>1</sup> For the laws of the United States governing the voting of electoral colleges, and the certification of the result by the State governor, see Electors IV.

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the return of the Tilden electors, with the certificate of the State Attorney-General, who was one of the returning board, annexed, given according to the popular vote as cast and filed in the office of the Secretary of State; 3, the same return as the second, fortified by the certificate of the new Democratic Governor, Drew, according to a State law of January 17, 1877, directing a recanvass of the votes.

The line of attack of the Democratic counsel upon the validity of the first (Republican) return was twofold.

1. They offered to prove that the State Returning Board, on its own confession, had cast out the votes of rejected precincts without any pretence of proof of fraud or intimidation; that it had thus been itself guilty of conspiracy and fraud, which fraud and conspiracy they had a right to prove on the broad principle that fraud can always be inquired into by any court, with the exception of two specified cases, neither of which applied here, and that the Supreme Court of Florida had decided the action of the Returning Board to be *ultra vires*, illegal, and void. 2. They offered to prove that Humphreys, one of the Hayes electors, was a United States officer when elected, and therefore ineligible.

The Republican counsel argued that the first return was in due form according to the Constitution and laws of the United States and the laws of Florida; that the second return, having been certified only by the electors and by an officer unknown to the laws as a certifying officer, was a certificate of unauthorized and uncertified persons, which could not be recognized or considered; and that the third return was entirely *ex post facto*, having been made and certified after the date on which the laws directed the votes of the electors to be cast, and when the Electoral College was *functus officio*.<sup>1</sup> Holding that, if the first return was valid, it excluded the other two, they

<sup>1</sup> See Electoral College.

confined their argument to the capacity of the commission to invalidate it.

This was denied on the ground that the question was not which set of Florida electors received a majority of the votes cast, for that was a matter which the State itself controlled, and its action could not be examined or reversed by any other State, or by all the other States together; but that the question was, which set of electors, by the actual declaration of the final authority of the State charged with that duty, had become clothed by the forms of law with actual possession of the office; in short, that the commission's only duty was to count the electoral vote, not the vote by which the electors had been chosen. To the general offer of evidence they replied that the consideration of such evidence was, 1, physically impossible, since the commission "could not stop at the first stage of the descent, but must go clean to the bottom," and investigate every charge of fraud and intimidation in all the disputed States, which would be a labor of years; 2, legally impossible, since the law (of 1792) itself prescribed the evidence (the governor's certificate) which was competent, and, when the commission had ascertained its correctness, its work was concluded; and 3, constitutionally impossible, since the commission was not a court and could not exercise judicial powers, which by the Constitution were vested in the Supreme Court and in inferior courts to be established; that the commission was not one of these inferior courts, since an appeal lay to Congress, not to the Supreme Court; and that its functions were ministerial, and confined to ascertaining the regularity of the certificates sent. To the special offer in Humphreys's case they asserted, as the general rule of American law, that votes for disqualified persons were not void unless the disqualification were public and notorious, that voters would never be presumed guilty of an intention to disfranchise

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themselves, and that the *de facto* acts of even a disqualified elector were valid.

February 7th, the commission voted, 1, to reject the general offer of evidence *aliunde* the certificates, and 2, to receive evidence in the case of Humphreys. Both votes were 8 to 7, Justice Bradley, the "odd man," voting on the first issue with the Republicans, and on the second with the Democrats. Evidence was then submitted to prove that Humphreys was a shipping commissioner, and that he resigned in October, 1876, by letter to the judge who had appointed him, but who was then absent from Florida on a visit to Ohio. The Democratic counsel argued that this was no resignation, since the judge, while absent in Ohio, was not a court capable of receiving a resignation in Florida. To this it was replied that the resignation depended on the will of the incumbent, and took effect from its offer without regard to its acceptance. February 9th, by the usual vote of 8 to 7, the commission sustained the validity of the Hayes electoral ticket entire, on the grounds, 1, that the commission was not competent to consider evidence *aliunde* the certificates, and 2, that Humphreys had properly resigned his office when elected.

II. *Louisiana*.—February 12th, three certificates from Louisiana were submitted to the commission. The first and third returns were identical, and were those of the Hayes electors, with the certificate of Gov. W. P. Kellogg, claiming under the count of the vote as finally made by the Returning Board. The second return was that of the Tilden electors, with the certificate of John McEnery, who claimed to be Governor; they claimed under the popular vote as cast. The Democratic counsel offered to prove that the average popular majority for the Tilden electors was 7639; that the Returning Board had fraudulently, corruptly, and without evidence of intimidation, cast out 13,236 Democratic and 2173 Republican



votes, in order to make an apparent majority for the Hayes electors; that two of the Hayes electors held United States offices, and three others State offices, which disqualified them under State laws; that the Returning Board had violated the State law by refusing to select one of its members from the Democratic party, and by holding its sessions in secret and not allowing the presence of any Democrat, or even of United States supervisors; that McEnery, and not Kellogg, was legally Governor; and they argued that the State law creating the Returning Board was void, as it conflicted with the Constitution by erecting a government which was anti-republican and oligarchical, since the Returning Board was perpetual and filled its own vacancies. The arguments of the Republican counsel were practically the same as on the Florida case, and the commission, by 8 to 7, upheld their view, February 16th. Nine successive motions by Democratic commissioners to admit various parts of the evidence had been first rejected, each by a vote of 8 to 7.

III. *Oregon*.—The facts in the case of this State were as follows: The three Hayes electors undoubtedly had a popular majority; one of them (Watts) was, when elected, a postmaster, and the Democratic Governor (Grover), declaring Watts ineligible, gave his certificate of election to the two eligible Hayes electors, and to Cronin, the highest Tilden elector. The two Hayes electors refused to recognize Cronin, accepted Watts's resignation, and at once appointed Watts to fill the resulting vacancy. Cronin therefore appointed two electors to fill the vacancies caused by the refusals to serve with him; these cast Hayes ballots, and Cronin a Tilden ballot. The result was two certificates from Oregon, submitted to the commission February 21st. The first return was that of the Hayes electors, with the tabulated vote of the State, and a certificate from the Secretary of State. The second re-

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turn was that of the Cronin electoral college, with the certificate of the Governor, and the attest of the Secretary of State. The Democratic counsel held that the second return, with the Governor's certificate, was legally the voice of Oregon, as the commission had decided in the case of Louisiana, and more exactly in the case of Florida; that it was strengthened by the attest of the Secretary of State, who was the canvassing officer by the laws of Oregon; and that it necessarily excluded the first return. The reply of the Republican counsel showed that, while they had avoided the Scylla of Florida, they had been equally successful in steering clear of the Charybdis of Oregon. They held that the Florida case did not apply; that there the basis of the decision was, that the commission could only inquire whether the Governor had correctly certified the action of the canvassing board appointed by the State; that in Florida and Louisiana the Governor had so correctly certified, while in Oregon he had not so certified, but should have done so; and that the commission was competent to make his action conform to the laws of his State. February 23d, the commission, by votes of 8 to 7 in each instance, rejected five successive, but various, resolutions to reject the vote of Watts; by a vote of 15 to 0, rejected the second return entirely; and, by a vote of 8 to 7, accepted the first return.

IV. *South Carolina*.—February 26th, two certificates from South Carolina were laid before the commission. The first return was that of the Hayes electors, with the certificate of Governor Chamberlain. The second return was a certificate of the Tilden electors, claiming simply to have been chosen by the popular vote, to have been counted out by the Returning Board in contempt of the orders of the State Supreme Court, and to have met and voted for Tilden and Hendricks. The Democratic counsel held that government by a returning board was not

republican, and that under President Grant's proclamation of October 17, 1876, declaring part of the State to be in insurrection, military interference had made the election a nullity. No serious effort was made to establish the validity of the second return. February 27th, the commission, by a vote of 8 to 7, rejected the offer to prove military interference; by a vote of 15 to 0, rejected return No. 2; and, by a vote of 8 to 7, accepted return No. 1. March 2, 1877, the commission adjourned *sine die*.<sup>1</sup>

It would seem no more difficult to impeach the constitutionality of the commission than that of the "twenty-second joint rule," under which so many former counts were made<sup>2</sup>; and in that case the legal title given to the new President, through the mediation of the commission, would seem to be on an exact equality with that of Lincoln, Johnson, or Grant.

The cruelly vicious feature in the scheme was the fact that fourteen members of the commission were practically irresponsible, while the fifteenth was secure in advance of a monopoly of the anger of one party or of the other. In the case of Mr. Justice Bradley the censure was totally undeserved. If the constitutionality of the commission be granted, as it was by both parties, the weight of law, in spite of the brilliant arguments of Messrs. Merrick, Carpenter, Green, and others of the Democratic counsel, lay in the Republican scale; and even in Louisiana, where the proceedings of the Returning Board were shamefully, or rather shamelessly, defenceless, the censure should fall not on the commission, but on the laws of Louisiana.

The *Proceedings of the Electoral Commission*, being Part IV., vol. v., of the *Congressional Record*, 1877, have been

<sup>1</sup> For the successive actions taken by the joint meeting on the commission's decisions, see Disputed Elections, III.

<sup>2</sup> See Electors.

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published in a single volume. It contains the arguments of counsel in full, the opinions of the commissioners, the journal of the commission, and all the certificates and objections.

On Electoral College and Electoral Count see (I.) 1 Elliot's *Debates*, 182, 208, 211, 222, 228, 283, 290, 302; 5 Elliot's *Debates*, 128, 131, 141, 192, 322, 334, 363, 507, 520, 586. (II.) McKnight's *Electoral System*; *The Federalist*, lxxviii.; Story's *Commentaries*, § 1449; 2 Bancroft's *History of the Constitution*, 169; Rawle's *Commentaries*, 58; 2 Wilson's *Law Lectures*, 187; 1 Kent's *Commentaries*, 262; *Phocion's Letters* (in 1824, copied in 24 Niles's *Register*, 373, 411); 5 Elliot's *Debates*, 541; the arguments and precedents in favor of the power of Congress to canvass the votes will be found in Appleton's *Presidential Counts*, pp. xliv.–liv. (III.) See *Annals of Congress* for the year required; these are collected in a more easily accessible form in Appleton's *Presidential Counts*, and the volume entitled *Counting the Electoral Votes* (H. of R. Misc. Doc., 1877, No. 13). (IV.) 1 *Stat. at Large*, 239 (act of March 1, 1792); 5 *Stat. at Large*, 721 (act of Jan. 23, 1845); *U. S. Rev. Stat.* §§ 131–142. (V.) 2 *Stat. at Large*, 295 (act of March 26, 1804); *Counting the Electoral Votes*, 224, 786 (the twenty-second joint rule); 13 *Stat. at Large*, 490 (act of Feb. 8, 1865); 19 *Stat. at Large*, 227 (Electoral Commission Act). (VI.) *Counting the Electoral Votes*, 16 (Bill of 1800); *Annals of Congress* (6th Cong.), 126 (Pinckney's speech); Appleton's *Presidential Counts*, 419 (*ibid.*); 7 Benton's *Debates of Congress*, 472, 473, 480 (the Benton, Dickerson, and Van Buren amendments respectively); *Counting the Electoral Votes*, 711 (the McDuffie amendment); 7 Benton's *Debates*, 603 (purports to give the amendment, but omits the amendment proper, as to the election of President, and gives only the provisions relating to the election of

Vice-President); 12 Benton's *Debates of Congress*, 659 (the Gilmer amendment); *Counting the Electoral Votes*, 422 (the Morton amendment); *Congressional Record*, Feb. 25, 1875 (the Morton bill); *North American Review*, January, 1877 (the Buckalew amendment); McMillan's *Elective Franchise*; *Congressional Record*, Dec. 19, 1881 (the Edmunds-Hoar bill). (VII.) *Counting the Electoral Votes*, and Appleton's *Presidential Counts*; for Jefferson and the Georgia votes in 1801, see, on the one side, 2 Davis's *Life of Burr*, 71; and on the other, 1 *Democratic Review*, 236.

On Disputed Elections see (I.) Hildreth's *United States*, 402; 1 von Holst's *United States*, 168; 2 Gibbs's *Administrations of Washington and Adams*, 488; 7 J. C. Hamilton's *United States*, 425; 9 John Adams's *Works*, 98; 6 Hamilton's *Works*, 480-523 (and Bayard's letters there given), 2 Randall's *Life of Jefferson*, 573; 2 Tucker's *Life of Jefferson*, 75, 510; 3 Jefferson's *Works* (ed. 1829) 444, and 4:515 (*Ana*); 1 Garland's *Life of Randolph*, 187; Parton's *Life of Burr*, 262; 3 Sparks's *Life and Writings of Morris*, 132; 2 Benton's *Debates of Congress*. (II.) 2 von Holst's *United States*, 4; 3 Parton's *Life of Jackson*, 54; 1 Colton's *Life of Clay*, 290; *Private Correspondence of Clay*, 109; 1 Benton's *Thirty Years' View*, 47; Sargent's *Public Men and Events*, 70; 2 Hammond's *Political History of New York*, 177; 8 Benton's *Debates of Congress*. (III.) 13 Benton's *Debates of Congress*, 738. (IV.) 23, 24 *Nation*; Appleton's *Annual Cyclopædia*, 1876-7; *Tribune Almanac*, 1877; *Congressional Record*, 1877; and authorities under Electoral Commission.

## CHAPTER XVII

### PARTIES AFTER 1861

**THE DEMOCRATIC PARTY.** — The situation of the Democratic party, when the extra session of Congress met in 1861,<sup>1</sup> was peculiarly unfortunate. Founded on a strict construction of the Constitution, and yet called upon to face a war in which, as it was not foreign but civil, the Constitution and laws were certain to be strained to their utmost tension,<sup>2</sup> it could only be at fault in whatever direction it turned. In the midst of an enormous revolution of thought and feeling, it alone endeavored to stem the current and to apply to 1861 the precedents of 1850. In the measures which the dominant party held patriotic and necessary, the issues of paper money, the laws for the confiscation of rebel property and slaves and for drafts, the suspension of the writ of *habeas corpus*, and the arbitrary arrests of suspected persons, it saw only partisan attempts to make party capital, or direct violations of law for the purpose of increasing party votes or of gratifying the spite of party leaders.

The mass of the party was therefore arrayed, throughout the Rebellion, against the methods by which the war was conducted; but there was a strong underlying sentiment in the party that the war itself was unnecessary, and that the troubles of the country could be most easily settled by a convention of the States. An active minority, chiefly in the border States and a few of the

<sup>1</sup> See Rebellion.

<sup>2</sup> See Construction, III. ; War Power.

Western States, was avowedly anxious for the success of the South; and their busy persistence, the general withdrawal of the war Democrats from the party, and the repugnance of the great mass of Democrats to the more violent war measures, enabled the dominant party to give the name of "copperheads" to the whole Democratic party.

In the first Congress of the war the Democrats had in the Senate but 10 out of 50 members, and in the House but 42 out of 178; in the next Congress (1863-5) they had 9 out of 50 Senators, and 75 out of 186 Representatives. But in both Congresses there were enough border-State members (7 Senators and 28 Representatives in the first Congress, and 5 Senators and 9 Representatives in the second), who generally acted with the Democrats, to make them a very effective opposition.

The political folly of secession may be partially estimated by considering the fact that only the voluntary absence of the 22 Senators and 66 Representatives of the seceding States gave the Republicans a majority in either House at any time until the real close of the Rebellion. In State elections the Democrats were very steadily defeated; throughout the last two years of the war but two Northern States, New Jersey and New York, had Democratic governors. But the majorities in these elections, with such exceptions as that of Ohio in 1863, were usually not large; and it would be fair to say that the two parties maintained about their proportional vote from 1860 until 1864, the continued Democratic loss of voters who fell off to the Republican party, through a desire for a vigorous prosecution of the war, being balanced by Democratic accessions of Republicans who were estranged by the gradual adoption of anti-slavery measures and attracted by the Democratic opposition to them.<sup>1</sup>

The national convention had been called to meet July

<sup>1</sup> See Abolition, III. ; Slavery.

4, 1864, at Chicago, but in June its meeting was postponed to August 29th. The selection of a Western city as the meeting-place, just at this time, was undoubtedly a great mistake, for the Western Democrats had been intensely excited in May, 1863, by the arrest and military conviction of C. L. Vallandigham, one of their leaders in Ohio, for attacking the management of the war in his public speeches. The influences which surrounded the convention from its first gathering by no means tended to calm deliberation, and their result was seen in the platform adopted, whose wording was almost equally brilliant, bitter, and fatal.

For the first time in twenty-four years the platform of 1840, the basis of the party's legitimate existence, was dropped; and the platform of 1864 makes no mention of any economic principle on which the party proposed to manage the Government, if successful. It consisted of six resolutions, all but one of which, the last, attacked the management of the war. The single exception expressed the sympathy of the party for the volunteers in the field. The others, 1, stated the party's adherence to the Union under the Constitution; 2, demanded a cessation of hostilities, and denounced the Administration for, 3, interfering with military force in elections, 4, suspending the writ of *habeas corpus* in States not in insurrection, and 5, refusing to exchange prisoners.

The most important, the second, is as follows, in full:

“ That this convention does explicitly declare, as the sense of the American people, that, after four years of failure to restore the Union by the experiment of war, during which, under the pretence of a military necessity of a war power higher than the Constitution, the Constitution itself has been disregarded in every part, and public liberty and private right alike trodden down, and the material prosperity of the country essentially impaired, justice, humanity, liberty, and the public welfare demand that immediate efforts be made for a cessation of



hostilities, with a view to an ultimate convention of all the States, or other peaceable means, to the end that, at the earliest practicable moment, peace may be restored on the basis of the Federal Union of the States."

The platform, therefore, made every issue on which the party had ever succeeded, or could ever hope to succeed, subordinate to an issue on which it had very faint hopes of success—a mistake which has been frequently repeated since. On the second ballot Geo. B. McClellan was nominated for President by 202½ votes to 23½ for Thos. H. Seymour, of Connecticut; and for Vice-President Geo. H. Pendleton was unanimously nominated on the first ballot.

In 1863 the Ohio Democracy had anticipated the error of the national convention of 1864, had nominated Vallandigham for governor on the single issue of his arrest, and been beaten by the enormous majority of 101,099 out of 476,223 votes. The result in 1864 confirmed that of 1863; the Democratic candidates received the electoral votes of only three States, New Jersey, Delaware, and Kentucky. The popular vote, however, had grown since 1860 parallel with that of the opposing party; in spite of the defection of war Democrats, the secession of half a million of its former voters, and a platform which did not gain a single vote, the party still polled forty-five per cent. of the total popular vote.

From July, 1865, until July, 1866, the Democratic party passed through the darkest part of its valley of humiliation. It was beaten by increased majorities in every Northern State election excepting a majority of a few hundred votes in Kentucky against an anti-slavery State constitution; and outside of the late seceding States but one State, Delaware, had a Democratic governor. In the Congress which met in December, 1865, the Democrats had but 10 out of 52 Senators, and 40 out

of 185 Representatives. All the excluded votes from the insurrectionary States could not now have given them more than a respectable minority in Congress.

The open breach between President Johnson and the Republican majority, about March, 1866,<sup>1</sup> was closely similar to that between President Tyler and the Whig party, twenty-five years before, and seemed at first to promise similar advantages to the Democrats. But the questions at issue were so complicated with the passions of recent armed conflict, and the Democratic party had so long been dealing with questions not fundamental to it, that it was now unable to follow the course of neutrality, coupled with a constant pursuit of its own economic objects, which its leaders had so skilfully and successfully taken in 1841-2. The party's strict-construction principles certainly compelled it to oppose reconstruction by Congress, but every consideration of policy should have counselled it to prevent this, if possible, from becoming the controlling question of politics. On the contrary, it fought against the passage of the preliminary and comparatively inoffensive Civil Rights Bill and Freedman's Bureau Bill with an acrimony which only resulted in their final passage without change, in the complete maintenance of the enormous Republican majority in the congressional elections of 1866, and in the passage of the act of March 2, 1867, which fairly began the process of reconstruction by Congress, with the certainty of a Republican majority of over three fourths in Congress, to complete it during the next two years.

The party thus renewed the mistake of 1864, and elected to fight upon ground of its adversary's choosing. During the remainder of President Johnson's term of office,<sup>2</sup> it struggled vainly but pertinaciously against the completion of reconstruction by Congress. The national

<sup>1</sup> See Reconstruction, Republican Party.

<sup>2</sup> See also Impeachments, VI.

convention met July 4, 1868, at New York City, and adopted a platform in eight resolutions, followed by a long arraignment of the Republican party for various violations of the organic law.

Most of the eight resolutions were devoted to the question of reconstruction. One of them, however, showed some signs of a return to the original political principles of the party; it demanded "a tariff for revenue upon foreign imports," though it was coupled with an ambiguous wish for "incidental protection to domestic manufactures" in arranging internal taxes. But it departed from Democratic precedents in two points: 1. Since the freedmen were now legally persons and not property, the Democratic principle of universal suffrage, for which the party had for eighty years contended, apparently attached at once to them also; the convention, however, declared in the strongest terms against negro suffrage. 2. The party had regularly resisted the establishment of any other currency than gold and silver by the Federal Government, not only as unconstitutional, but as eventually bearing most hardly upon the masses of the people, and within five years it had strenuously opposed the adoption of the legal-tender paper currency; the convention, however, seduced by the idea of forcing upon the bondholder the same currency which the people had been compelled to accept, declared in favor of the payment of the debt in legal-tender paper, except those portions of it which were in terms payable in coin.

The political course of Chief Justice S. P. Chase, particularly during the impeachment of President Johnson, had gained many friends for him in the Democratic party, and the convention would probably have nominated him but for the determined opposition of the delegates from his own State, Ohio, who were anxious to nominate Pendleton. On the first ballot the vote stood: Pendleton, 105; Andrew Johnson, 65; Hancock, 33½;

Sanford E. Church, of New York, 33; and 79½ scattering. Johnson's vote immediately and rapidly decreased. Pendleton's vote rose to 156½ on the eighth ballot, and then fell until his name was withdrawn on the eighteenth ballot. The votes for other candidates underwent little change, except those for Hancock and T. A. Hendricks, which rose to 135½ for Hancock and 132 for Hendricks on the twenty-first ballot. On the next ballot the Ohio delegation insisted on nominating Horatio Seymour, and the unanimous vote of the delegates was at once cast for him. F. P. Blair was then nominated for Vice-President.

The platform had emphatically declared the reconstruction acts of Congress to be "a usurpation, unconstitutional, revolutionary, and void"; and this declaration was made more prominent by a previous letter of the candidate for the Vice-Presidency (the "Brodhead Letter" of June 30, 1868), to the effect that the President-elect must "declare these acts null and void, compel the army to undo its usurpations at the South, disperse the carpet-bag State governments, and allow the white people to reorganize their own governments." Until this was done it was "idle to talk of bonds, greenbacks, gold, the public faith, and the public credit." In other words, every issue was still to be subordinate to that of reconstruction. In the presidential election the Democratic candidates were defeated, but their proportion of the popular vote had risen to 47½ per cent. In the North there was no sign of a change in the electoral vote; in that section Democratic electors were chosen only by New Jersey, Oregon, and New York, and the votes of the last-named State, it was widely believed, were carried by frauds in New York City. In the Congress which met in December, 1869, there were 15 Democrats out of 72 in the Senate, and 96 out of 227 in the House.

The congressional elections of 1870 resulted in a trifling increase in Democratic strength. In the Senate there

were now 17 Democrats out of 74, and in the House 105 out of 242. The first term of President Grant rapidly developed a strong feeling in a minority of the Republican party, the so-called "Liberal Republicans," that the national police power had been exercised beyond legal limits in the Southern States since their reconstruction.

This "Liberal Republican" minority in 1872 held a national convention at Cincinnati, adopted a platform, and nominated Horace Greeley and B. Gratz Brown, of Missouri, as presidential candidates.

The Democratic National Convention met at Baltimore, July 9, 1872. It adopted the Cincinnati platform by a vote of 670 to 62, and nominated the Cincinnati candidates by votes of 686 to 46 for Greeley, and 713 to 19 for Brown. The platform was in reality the most thoroughly Democratic which the party had adopted since 1840, with the single exception of its refusal to decide for or against protection,<sup>1</sup> and, as it formally recognized the validity of the last three constitutional amendments, but demanded in return local self-government for all the States, it probably afforded to the party the fairest possible avenue of escape from the difficulties of reconstruction.

As might have been foreseen, the recent bitternesses of party conflict handicapped Greeley very heavily from the beginning; the number of Democrats who refused to vote far more than counterbalanced the Liberal Republicans who voted for him, and the Democratic candidates were defeated, receiving but forty-three per cent. of the popular vote. The responsibility for the result is, however, fairly chargeable to the unwise selections of the Cincinnati convention; had it seen fit to nominate C. F. Adams and an acceptable Democrat, the result might easily have been different. About thirty thousand Democrats voted for the nominees of a "straight-out" Democratic convention, held at Louisville, September 3d, though the nom-

<sup>1</sup> See Liberal Republican Party.

inees, Chas. O'Connor, of New York, and John Quincy Adams, of Massachusetts, declined the nomination. The defeat in the presidential election of course included a falling off in the congressional representation; in the following Congress the Democrats had but 88 out of 290 Representatives, the Senate being almost unchanged.

Though the party had been so badly defeated in 1872, its prospects for national success date only from that year. By a single effort it had cast off the burden under which it had been laboring for years, had sloughed off that great mass of its voters who were Democratic only on one point—the memories of the anti-slavery and reconstruction conflicts,—and now stood, for the first time since before 1850, upon the ground of its economic principles, ignoring for the present the tariff question.

It would be unfair to ascribe to this "new departure" alone the growth in the Democratic vote for the next two years, for this was greatly assisted by many concurrent circumstances of President Grant's second term,<sup>1</sup> and particularly by the general financial distress which began to be felt in 1873; but it is at least certain that the Democratic proportion of the vote of agricultural districts began generally to increase after 1872 for the first time since 1854. In 1874 the change was so marked that the elections of the year were commonly known as a "tidal wave." In the Northern State elections of 1874-5, New Hampshire, Connecticut, New York, New Jersey, Pennsylvania, Ohio, Indiana, Illinois, California, Nevada, and Oregon were carried by the Democrats; even Massachusetts introduced into her State government the phenomenon of a Democratic governor; and in the Congress which met in 1875 the Democrats had 198 out of 292 members of the House, though they still had less than one third of the Senate.

This sudden tide of success, however, in the North,

<sup>1</sup> See United States.

was balanced by a more general but more portentous success in the South, for which a great part of the responsibility must fall upon the abandonment by the party in 1868 of its fundamental principle of broadening suffrage. Its action left no option either to Southern negroes or to Southern whites and taxpayers: it forced the former into the Republican party, and compelled the latter, in sheer self-defence, to take the name of Democrat, no matter what their political principles might be.

The consequence was that, so early as 1874-5, the whole South, with the exception of South Carolina, Florida, Louisiana, and Mississippi, was nominally Democratic, and a full half of the Democratic vote in the House was Southern, comprising in its ranks Democrats, protectionists, greenbackers, and internal-improvement men, all agreeing firmly on but one Democratic doctrine, the right of each State to self-government. The homogeneity of the party was thus injured, its action hampered and crippled, and its policy dwarfed to the care of a single section, thus checking again the national growth which had fairly begun. Had the "Chase Platform" of universal suffrage been adopted in 1868 and adhered to, it would probably not have affected the negro vote in that year, or perhaps in 1872, but the party in 1874, with but a fair half of the Southern vote, would have been in far better position to take the crest of the wave of opportunity and develop again into a true national party. Here, as always since 1844, the party felt the want of those leaders who, until 1844, strenuously and successfully opposed the acceptance of any issue whatever which would narrow the party action to the care of a section.

The national convention met at St. Louis, June 28, 1876, and adopted a platform which, like all modern productions of the kind, was too long for popular use and better adapted for a campaign document; but it was at

least almost entirely in harmony with the party's hereditary principles. It again accepted the last three constitutional amendments; it "denounced the present tariff, levied upon nearly four thousand articles, as a masterpiece of injustice, inequality, and false pretence," and "demanded that all custom-house taxation shall be only for revenue"; and for the first time in many years it relegated the Southern question to an entirely subordinate position. On financial questions it demanded due preparation before the resumption of specie payments; and the rest of the platform was entirely an indictment of the Republican party. On the first ballot for a candidate for President the vote stood: Tilden, 404½; Hendricks, 140½; Hancock, 75; Wm. Allen, of Ohio, 54; Thos. F. Bayard, of Delaware, 33; and 37 scattering. Before the second ballot was finished, Tilden's nomination was made unanimous. His leading competitor, Hendricks, was then nominated for Vice-President.

The result of the election was that the Democratic candidates had a majority over all in the popular vote, obtained a majority of the Representatives to the succeeding Congress, and claimed a majority of the electoral votes, though this was finally decided against them.<sup>1</sup> There can be no doubt that the whole party believed that the forms of law had been foully perverted to its injury in this decision; but its peaceful submission to the result was at least a useful proof of the strength of the American form of government.

The South, including even the four States which had formerly been exceptions, was now solidly Democratic, though its unification was not based upon the acquiescence of a majority of its voters in fundamental Democratic principles, but was still entirely a measure of self-defence against the one overshadowing danger which the improvident action of the Democratic convention in

<sup>1</sup> See Disputed Elections, IV. ; Electoral Commission.



1868 had made permanent. This solidification, and the entire disappearance of the Republican vote in many Southern districts, were skilfully used by Republican leaders, during the next four years, for the decrease of the Democratic vote in the North and West; and the result was very plainly seen in the congressional elections of 1878. In the Senate the Democrats had 42 out of 76 members, and in the House 149 out of 293; but 30 of the Senators, and 105 of the Representatives, were from a single section, the South.

Had this Southern majority been strict constructionist, pure and simple, as in Jefferson's time, it would have injured the party very little; but in fact, outside of the wish for local self-government for the States, there was hardly an article of the Democratic creed, from a revenue tariff to opposition to internal improvements, in support of which this nominally Democratic representation from the South was at all unanimous. The party's prospects would have been far better in the hands of a congressional minority wholly devoted to its principles than in those of a majority on which it could not rely. During the period of its nominal control of one or both branches of Congress (House, 1875-81; Senate, 1879-81), it is hardly possible to specify any point of Democratic policy which it even attempted to enforce, excepting the reduction of Federal expenses and the freedom of State governments.

The national convention was held at Cincinnati, June 23, 1880, and adopted a platform which, though somewhat paragraphic and disjointed, was in the main in consonance with the party's principles, though its financial paragraph can hardly be considered entirely Jeffersonian. It declared for "home rule; honest money, consisting of gold and silver and paper convertible into coin; and a tariff for revenue only." The remainder of the platform was devoted to denunciation of the "fraud of 1876."

On the first ballot for presidential candidates the vote stood: Hancock, 171; Bayard, 153½; H. B. Payne, of Ohio, 81; A. G. Thurman, of Ohio, 68½; S. J. Field, of California, 65; W. R. Morrison, of Illinois, 62; Hendricks, 50½; and 185 scattering. On the second ballot Hancock was nominated by all the votes of the convention, except those of Indiana for Hendricks, and 3 scattering. W. H. English was then unanimously nominated for Vice-President.

In the presidential election of 1880 the Democratic candidates were defeated. The defeat would seem to have been due mainly to the party's congressional majority, not so much because of its sectional character, after all, as because of its long influence in preventing the development of a national party policy. Even when, late in the canvass, the Republican party elected to fight upon Democratic ground, the tariff question, the party, which had had no education on the question from its own Representatives, weakly endeavored to avoid it, and lost votes by its weakness. On the popular vote the Democratic candidates were slightly in a minority; of the electoral votes they received all those of the Southern States, and in the North those of New Jersey, Nevada, and five of California's six votes. Of the Congress to meet in December, 1881, the Democrats elected 136 out of 293 Representatives, thus losing the majority in the House for the first time since 1875; both parties had the same number in the Senate. But it is noteworthy that, for the first time in many years, nine of the Southern Representatives were Republicans, an augury, perhaps, of the party's release from the worst impediment to its national development.

In its history to the present time the party has had but three leaders of the first rank, Jefferson, Madison, and Jackson. Jackson's name must be included, despite his phenomenal ignorance of very many of the commonest

subjects of human knowledge; his skill in reorganizing a party out of chaos, his unerring certainty and success in going to the very marrow of unexpected political difficulties and in marking out the party policy, his ability to *lead* his party in the path of its own principles in spite of ambitious subordinates, and the distinct stamp which he left upon the opinions of the school of politicians who succeeded him in the control of the party until 1844, all show him to have been a leader more effective, in some respects, than either of the others. The number of leaders of a lower grade has, of course, been very great, and the reader must be referred, as to them, to Gillet's *Democracy in the United States*. The theoretical basis of the party has always been the principles formulated by Jefferson, though these were not put by him into any connected form, except in two instances,<sup>1</sup> but must be sought for in detached letters throughout his collected works, or in his messages. His first inaugural address, in 1801, is his nearest approach to the formation of a systematic political creed. The political writings of William Leggett, editor of the *Evening Post*, of New York City (1834-6), are a collection fully as valuable to any one who desires to study the Democratic side of American politics before 1844.<sup>2</sup> Since that year it has been the party's misfortune that it has almost always been engaged in combating some one or more of its own fundamental principles, so that it is difficult to give any general reference during this period which would not be more or less misleading. Perhaps the *Democratic Review*, up to its cessation in 1859, and Spencer's *Life of T. F. Bayard*, would give a fairly consistent view of the party's application of its theory to the practical questions of American politics. The Jeffersonian doctrine, in its modern form, is also given incidentally in Governor Horatio Seymour's lecture

<sup>1</sup> See Kentucky Resolutions; Bank Controversies, II.

<sup>2</sup> See also Loco-Foco.

on "The History and Topography of New York," at Cornell University, June 30, 1870.

The future of the party (from the view-point of 1881) must be largely a matter of speculation. Its destruction or disappearance is in the highest degree improbable; if there were no Democratic party in existence, the first consistent policy proposed by an administration would force the evolution of one. But it seems probable that its future basis will, to some extent, be changed in the following direction.

The Jeffersonian basis of the party, however useful in its time, is open to one great objection: it ignores the progress of the country. It attempts to lay down the rigid rule that the exercise of certain derived powers by the Federal Government, no matter how imperatively it may be needed, no matter how much steam, electricity, and war may have changed the basis of existence of the country, is still and always *a violation of the organic law*. No party, not the Democratic party itself, not Jefferson himself, has ever lived up to the rule in practice; nor has any one who refused to live up to it felt himself to be really a violator of law. But the continued charge that a broad construction of the Constitution is *unlawful*, coupled with the constant exercise of broad construction by all parties in emergencies, has done much to sap the reverence of the people for the Constitution itself, and to give an air of unreality to the professions of Democratic leaders; it has enabled the opponents of the party to meet every profession of Democratic faith with apt precedents drawn from Democratic theory or practice; and it has again and again forced the party into a demoralizing acceptance of that which it had but very recently been denouncing as a violation of law.

The change which is necessary seems to be the basing of the party upon expediency rather than upon claims of absolute law in the matter of powers which are fairly

doubtful. Of course there are powers which are either flatly prohibited to the Federal Government, such as the power to tax exports, or are plainly ungranted, such as the power to impeach a private citizen; as to these there can be no difference of opinion in regard to the legality of their exercise by the Federal Government. But in regard to the great mass of doubtful powers the claim that it is inexpedient to exercise them is a far more fitting basis for a great political party than the claim that it is illegal to exercise them. The former not only gives an elasticity to party action which is wanting in the latter, but implies a consciousness of strength in argument; the latter is too often only a substitute for argument and a confession of inability to argue the question at issue. There are many symptoms of this change to a basis of expediency among thinking Democrats, the last and most noteworthy being the address of Clarkson N. Potter before the American Bar Association in August, 1881.

The objection to such a change would be, that it would open the way to an indefinite latitude of construction by a dominant majority in Congress; the answer to the objection is, that the dreaded result has always been the practical rule of American politics, even in face of the loudest assertion of the illegality of broad construction, and that a stand upon the inexpediency of broad construction would relieve the strict-construction party from the lengthening chain of the past and give it easier access to the several elements of the opposing party in the future. The particularist element in the United States will always be strong enough to act as a controlling force upon broad construction, and the more highly the political sentiment of the country is educated the less necessary becomes the ultra-Jeffersonian idea of the absolute illegality, under all circumstances, of broad construction.

For references on Parties, see pp. 225, 226, 274-279.

**NOMINATING CONVENTIONS** are entirely a modern and democratic innovation, originating about the year 1825. Their development has come through the successive steps of a private caucus, a legislative caucus, and a congressional caucus, down to the perfected machinery of a modern political party's township, county, State, and national nominating conventions.

I. *Origin.*—Before, during, and immediately after the Revolution, the inception of political action in America was mainly controlled by a series of unofficial coteries of leading and kindred spirits in every Colony, by whom resolutions were prepared, intelligence was disseminated, and occasionally revolutionary action was directly begun. In New England they controlled or led the town meetings; in the South they commonly acted through the district militia organizations; but elsewhere they hardly preserved any semblance of connection with the legitimate political units. Their existence, and the popular acquiescence in their action, was due partly to the manner in which suffrage was then limited by property qualifications, so that the caucuses, or juntas, were really fair and trusted representatives of the legal voters; and partly to the still surviving respect for the influential classes. Their survival may be seen in the Democratic clubs of 1793, in the Federalist "Essex Junto" and the Democratic "Albany Junto" of the immediately subsequent years, in the Tammany Society, in the "Albany Regency" of 1820-45, and, in a modified form, in the various "rings" of later years.<sup>1</sup>

Upon the organization of the Federalist and Republican parties after 1790, their workings were at first limited by the traditions of the past. In a party of that time the national and State leaders filled the place of a national convention, settling the party policy by a voluminous correspondence, or by personal interviews.

<sup>1</sup> See Democratic Clubs, Albany Regency.

The position of these leaders was wholly due to their success in gaining the confidence and support of the still powerful local caucuses; so that these latter were still the skeleton of each party organization. The manner of their workings in the Federalist State of Connecticut may serve as an example. Goodrich, a Federalist in sympathy, thus describes a town meeting of 1796-1810:

" Apart in a pew sat half a dozen men, the magnates of the town. In other pews near by sat still others, all stanch respectabilities. These were the leading Federalists, persons of high character, wealth, and influence. They spoke a few words to each other, and then relapsed into a sort of dignified silence. They did not mingle with the mass; they might be suspected of electioneering. Nevertheless the Federalists had privately determined, a few days before, for whom they would cast their votes, and being a majority they carried the day."

John Wood, a Democratic writer of the time, gives an exaggerated estimate of the influence of the Congregational clergy, and describes the politics of the State as controlled by Timothy Dwight, President of Yale College, and "pope of the State," his twelve "cardinals of the corporation," and the multitude of inferior clergy, whose annual consultation was held at the commencement in September; but clerical influence was only a part of the wider class influence which Wood could not understand. The two pictures are complementary; and the reader can see their application to national affairs in the collected correspondence of Hamilton, Jefferson, Pickering, or any other political leader of the time.

As the dividing line between the parties became more strongly marked, the necessity of some organized guide to party action became more apparent; and the perception of the necessity was quickened by the growth of the democratic spirit in both parties. There was an increasing number of local leaders who demanded participation

in the councils of the party, and these found their natural means of expression in the legislative bodies. As a part of the annual business of Congress and the State legislatures, there grew up a system of legislative and congressional caucuses of the members of each party, the former to make State nominations, the latter to make presidential nominations.

Both these political means may fairly be considered as dating from 1796. It is true that nominations had been made in a few States by legislative caucuses before that year; but these were such cases as the nomination of Governor Jay in New York, in 1795, when members of the Legislature merely voiced a unanimous feeling of their party in the State. It was not until after 1796 that the legislative caucus undertook to decide, among rivals for nomination, which should be entitled to the support of the party. After 1797 this was regularly the case everywhere. Very often, however, citizens from various parts of the State took part in the legislative caucus, and their signatures, in a separate list, were added to the address with which the caucus always announced its nominations to its party. Of course their presence was only allowed as a make-weight, and not as a controlling influence in the caucus, but it prepared the way for the system of nominating conventions which was to follow.

This final system, like most other innovations in the American practice of politics, had its origin in New York. It was first suggested in January, 1813, by the ultra-Democratic "bucktail" faction, or Tammany Society, of New York City, then fighting De Witt Clinton, and apprehensive of his influence over the Democratic members of the legislature out of New York City. They therefore proposed formally that a State convention should be called for the purpose of nominating a governor. Their proposal was not ratified by the party, and nothing more was heard of it until 1817, when it was revived in a



modified form, this time by the Clintonians. In a purely legislative caucus of either party, the districts which had chosen members from the opposite party would not be represented; and in 1817 a number of Clintonian counties, whose members of the legislature were Federalists, chose delegates to represent the Democratic voters in the caucus. These were admitted, and aided in nominating Clinton.

The effect was at once perceptible. Conventions for the nomination of members of the legislature became the regular mode of procedure; the practice spread to other States; and the time was evidently not distant when conventions of delegates would take control of the party machinery in the State, and finally in the nation.

The congressional caucus received its death-blow in 1824, and the legislative caucus, as a State nominating body, perished about the same time. In both cases the reason was the same: the old politicians, who had for years controlled the action of the dominant party, had too strong a hold upon the party machinery to be resisted in the regular caucuses; and the new politicians, whom the rising democratic spirit and the extension of the suffrage were together bringing to the front, preferred to try the issue with the old party leaders in some new forum. Instead of the congressional caucus, the legislatures of various States assumed the functions of nominating bodies for the election of 1828. Legislative caucuses for purely State nominations were almost as rapidly abandoned. In 1824 they were still held, mainly for the nomination of electors; but in Rhode Island the legislators were careful to call themselves "citizens from various parts of the State"; and in Pennsylvania the members of the legislature led the way by calling a Democratic State convention to nominate electors. In New York the opponents of the "Albany Regency," hopeless of success in a legislative caucus, planned a delegate State conven-

tion to nominate John Young for governor, but the Regency's legislative caucus threw them into confusion by nominating Young, and the convention was not held until the following year. This (of 1824) was the last legislative caucus for State nominations ever held in New York; there, and in all other doubtful States, State conventions at once became the nominating bodies. Thereafter it was only in such unilateral States as South Carolina that legislative caucuses retained anything of their old unofficial powers.

During Jackson's first term of the Presidency (1829-33) the State-convention system, the middle term of the great modern party "machine," was well built up. Awkward attempts were made in 1830-32 (see below) to erect the superstructure, the national convention. The nominal basis of parties, the local township or county conventions, were hardly yet in existence, except in the great cities; in the country, nominations and ratifications were still made by mass meetings. Before 1835, under the skilful management of Van Buren and his associates, the Democratic "machine" was fairly complete in all its parts, local, State, and national conventions; and the model has since been only more finely polished, not improved upon or developed. The Whigs were later in adopting it. Their organization was very incomplete in 1836; in 1839-40 it was better but was thrown into confusion by the mob-system of fighting to which the party leaders then resorted; but before 1844 both parties were organized alike.

Since that time every great national party has carried on its political warfare by means of a regular army of politicians, to whom politics is a trade, like war, the nominating conventions are the weapons, the voters are the magazine, and the offices, appointive rather than elective, are the *causa belli*, the spoils of the campaign, and the bond of party cohesion. Of the three essentials

to the existence of the politician class, it is not desirable to abolish the voters; the effort to remove the appointive offices from politics has not yet been successful; and no plausible plan to deprive them of their most effective weapons, the nominating conventions, has yet been suggested.

II. The laws which govern local and State conventions are the ordinary parliamentary rules of proceeding. In the national conventions there are certain special characteristics which have hardened into laws.

1. *Democratic Conventions.*—In Democratic national conventions the State has always been the normal voting unit. The casting of the vote of the State as a unit, by the will of a majority of the delegation, has always been recognized as legitimate and regular; and when the vote of a State has been divided, and the minority of the delegation allowed a voice, it has been by the will of the delegation, not of the convention. In this there is the great difficulty that an unavailable candidate might be nominated by the concurrent vote of a number of States, none of which could possibly be carried by any Democratic candidate. To counteract this difficulty the celebrated “two-thirds rule” has always been the law of Democratic national conventions: it requires that two thirds of the delegates shall vote for a candidate to secure him a nomination. It has never been formally settled whether the two thirds is of all the delegates present, or of all the delegates admitted; but Douglas’s and Breckinridge’s nominations in 1860 both followed the former rule. No votes are given to delegates from Territories, since their constituents cannot vote at the elections. For each State two delegates are admitted for each electoral vote.

2. *Republican Conventions.*—A Republican national convention consists also of two delegates for each electoral vote in the States; but six [in 1905] delegates from

each Territory are admitted, with power to vote. This last feature is intended to build up a party strength in the Territories before they become States. The voting unit has always been the congressional district, or the individual delegate. Among party managers there has always been a lurking desire to introduce the Democratic unit system of State voting and the "two-thirds rule," but only one serious attempt has been made to enforce it. In 1880 the State conventions of Pennsylvania, New York, and Illinois instructed their delegations to vote as a unit for Grant, though a strong minority had been elected under instructions from their local conventions to vote for other candidates. The national convention sustained the minority in their claim of a right to cast their votes without regard to the State convention's instructions. Practically, therefore, it may be laid down as the Republican theory that the local conventions in the congressional districts are to select delegates, instructing them, but not irrevocably; and that the State conventions are only to select the four delegates corresponding to the State's senatorial share of the electoral votes, with two additional delegates if the State elects a Congressman-at-large. Any usurpation of powers by the State convention will be summarily set aside by the national convention.

3. *Other Conventions.*—The conventions of third parties, or attempts to form third parties, are much more likely to follow the Republican than the Democratic model, for they lack the organized constituency, or "machine," which gives the latter its form and is constantly striving to imitate it in the former. For the same reason the delegates are, to a very great degree, practically self-appointed, or appointed by little cliques of voters. The evolution of a new national party is now attended with almost insuperable difficulties. It must be the result either of the patient labor of years in a clear

field, as in the case of the Democratic party; or of a great popular movement, sustained long enough to produce a regular army out of a mob, as in the case of the Republican party. Until some successful substitute for the convention system is discovered, we may consider the sporadic third party national conventions as foredoomed failures.

III. State and local conventions have been so numerous since 1825 that it is impossible to notice them particularly. The proceedings and results of the national conventions are given under the names of the various parties; it is only designed here to collect the places and dates of the party conventions preparatory to each presidential election, and the names of their several nominees.—1832. *Anti-Masonic*<sup>1</sup>: Baltimore, Sept. 26–28, 1831; Wirt and Ellmaker. *National Republican*<sup>2</sup>: Baltimore, Dec. 12–14, 1831; Clay and Sergeant. *Democratic*: Baltimore, May 22, 1832; Van Buren for Vice-President.<sup>3</sup>—1836. *Democratic*: Baltimore, May 20, 1835; Van Buren and Johnson. There was no Whig national convention for this election.<sup>4</sup>—1840. *Whig*: Harrisburgh, Pa., Dec. 4–7, 1839; Harrison and Tyler. *Democratic*: Baltimore, May 5, 1840; Van Buren for President.<sup>5</sup> The “Liberty party” nominations<sup>6</sup> were made by a local convention in New York.—1844. *Liberty*: Buffalo, Aug. 30, 1843; Birney and Morris. *Whig*: Baltimore, May 1, 1844; Clay and Frelinghuysen. *Democratic*: Baltimore, May 27–29, 1844; Polk and Dallas.—1848. *Democratic*: Baltimore, May 22–26, 1848; Cass and Butler. *Whig*: Philadelphia, June 7–8, 1848; Taylor and Fillmore. *Free-Soil*: Buffalo, Aug. 9–10, 1848; Van Buren and Adams.—1852. *Democratic*: Baltimore, June 1–4, 1852; Pierce and King. *Whig*: Baltimore, June 16–19,

<sup>1</sup> See Anti-Masonry, I.

<sup>2</sup> See Whig Party, I.

<sup>3</sup> See Democratic Party, IV.

<sup>4</sup> See Whig Party, II.

<sup>5</sup> See Democratic Party, IV.

<sup>6</sup> See Abolition, II.

1852; Scott and Graham. *Free-Soil*: Pittsburgh, Aug. 11, 1852; Hale and Julian.—1856. *American* ("Know-Nothing"): Philadelphia, Feb. 22-25, 1856; Fillmore and Donelson. *Democratic*: Cincinnati, June 2-6, 1856; Buchanan and Breckinridge. *Republican*: Pittsburgh, Feb. 22, 1856 (for party organization only); Philadelphia, June 17, 1856; Frémont and Dayton. *Whig*: Baltimore, Sept. 17-18, 1856; ratified the "American" nominations.—1860. *Democratic* (Douglas): Charleston, S. C., April 23-May 3, Baltimore, June 18-23, 1860; Douglas and Johnson; (Breckinridge) Charleston, May 1-4, Richmond and Baltimore, June 11-28; Breckinridge and Lane. *Constitutional Union*: Baltimore, May 9-10, 1860; Bell and Everett. *Republican*: Chicago, May 16-18, 1860; Lincoln and Hamlin.—1864. *Republican* (Radical): Cleveland, May 31, 1864; Frémont and Cochrane; (Regular) Baltimore, June 7, 1864; Lincoln and Johnson. *Democratic*: Chicago, Aug. 29, 1864; McClellan and Pendleton.—1868. *Republican*: Chicago, May 20-21, 1868; Grant and Colfax. *Democratic*: New York, July 4-11, 1868; Seymour and Blair.—1872. *Liberal Republican*: Cincinnati, May 1, 1872; Greeley and Brown. *Republican*: Philadelphia, June 5-6, 1872; Grant and Wilson. *Democratic*: Baltimore, July 9, 1872; ratified the "Liberal Republican" nominations.—1876. *Greenback*: Indianapolis, May 17, 1876; Cooper and Cary. *Republican*: Cincinnati, June 14-15, 1876; Hayes and Wheeler. *Democratic*: St. Louis, June 27-29, 1876; Tilden and Hendricks.—1880. *Republican*: Chicago, June 2-8, 1880; Garfield and Arthur. *Greenback*: Chicago, June 9-11, 1880; Weaver and Chambers. *Democratic*: Cincinnati, June 22-24, 1880; Hancock and English.—Whenever the above conventions have been in session more than one day, the nominations must be assigned to the last day.—See authorities under the names of the parties.

**THE GREENBACK-LABOR OR NATIONAL PARTY.—I.** Before the War of the Rebellion agriculture was under many disadvantages in the Western States and Territories. Grain, after the payment of transportation to a market, seldom paid any great profit, and the use of corn for fuel was quite common. During the war the Government became a heavy customer of easy access, the mortgages on farms, originally due in gold, were paid in paper at from fifty to sixty per cent. discount, and in 1865 agriculture was at its flood-tide of prosperity. All was commonly attributed, however, to the inflation of the currency by the introduction of "greenbacks," and since 1865 there has been a constant disposition among many men of all parties in the agricultural States to recur to the inflation of the currency as a remedy for evils of all sorts,—for the loss of the Government as a customer, for loss upon crops, or for general financial distress.

Another influence, closely kindred to the foregoing, is the feeling of many farmers that the bankers, particularly in the Eastern States, whom they suppose to hold most of the bonds of the United States, made a hard bargain with the Government in the time of its greatest need, and have been trying to make their bargain harder ever since; that, having paid for their bonds in greenbacks worth from thirty-eight to seventy-five cents on the dollar, they would have been well paid in greenbacks at or near par; that they had influenced Congress to give them, in the act of March 18, 1869, more than their due by making all bonds payable "in coin," even when the face of the bond did not specify the medium of payment, and that, when silver began to decrease in value as compared with gold, they had again influenced Congress in 1873 to demonetize silver and thus make their bonds payable in gold alone. These two influences, aided by discontent at the exemption of United States bonds from taxation, have been the foundation of the Greenback party

proper; subsidiary influences only began to affect it after 1876.

So early as 1868 the proposition to pay in greenbacks that part of the national debt not specifically payable in coin, particularly the 5-20 bonds, had become known as the "Ohio Idea." It controlled the Democratic convention of that year,<sup>1</sup> and its leading advocate, Pendleton, was strongly pressed for the Democratic nomination for the Presidency. For some years afterward Democratic State conventions throughout the Western States reiterated the Ohio Idea in their platforms, but this had generally ceased except in Ohio before 1871, and disappeared in the coalition of the Democratic and Liberal Republican parties in the following year.

*Greenback Party.*—The passage of the Resumption Act of January 14, 1875, committing the Government and people to the payment of the debt in specie in 1879, revived the Greenback feeling. The proposal of the measure had brought about a Greenback convention at Indianapolis, November 25, 1874, which adjourned after indorsing by resolution the three propositions which have been the foundation of all Greenback platforms since that time: 1, that the currency of all national and State banks and corporations should be withdrawn; 2, that the only currency should be a paper one, issued by the Government, "based on the faith and resources of the nation," exchangeable on demand for bonds bearing interest at 3.65 per cent.; and 3, that coin should only be paid for interest on the present national debt, and for that portion of the principal for which coin had been specifically promised. The development of the new party was checked for a time by the continued adoption by Democratic State conventions of the three propositions just mentioned; but it was revived again toward 1876 by the growing likelihood that the Democratic nomination for

<sup>1</sup> See Democratic Party, this chapter.



the Presidency would fall to Governor Tilden, of New York, who was not an advocate of the Ohio Idea.

A national convention of the "Independent" party, the formal name of the party at this time, was held at Indianapolis, May 17, 1876, and nominated Peter Cooper, of New York, for President, and Newton Booth, of California, for Vice-President. The latter declined, and Samuel F. Cary, of Ohio, was substituted. The platform indorsed the three propositions above mentioned, and demanded the repeal of the Resumption Act. In the presidential election the Greenback candidates received 81,737 popular votes, over half of them in the five States of Illinois, Indiana, Iowa, Kansas, and Michigan.

In the State elections of 1877 the vote of the party rose to 187,095. Greenback State tickets were nominated in most of the Northern States, though they had little popular strength outside of the Western States.

Working men's parties have always been occasional features in State and local politics. About 1877 they began to be more general, and the grievances which led to the railroad riots of that year gave them a national importance. In some State elections, as in Massachusetts and Pennsylvania, the "Labor Reform" and "Greenback" parties united, and the union was made national by the convention of February 22, 1878, at Toledo, Ohio. This convention recognized the name "National" for the party, which seems to have been first used in Ohio in 1877, but the usual name for the party continued to be "the Greenback-Labor party." The platform added to the former Greenback platform some resolutions in favor of legislative reduction of working men's hours of labor and against the contract system of employing inmates of prisons.

In the State and congressional elections of 1878 the Greenback-Labor vote suddenly rose to over 1,000,000, and fourteen Congressmen were elected by it. The in-

crease, however, was almost entirely due to the fact that the party had become a union of all the discontented elements. Its greatest development was in States like Iowa, Maine, and Massachusetts in the North, or West Virginia, Georgia, and Missouri in the South, where the dominant party's majority was fixed and large, and where the minority in despair adopted the Greenback-Labor organization as the only possible means of success. In the North the fusions were of Democrats and Nationals; in the South they were of Republicans and Nationals; while in the closely contested and doubtful States the National vote amounted to nothing except as a means of drawing off a small percentage of votes from the Democratic or Republican party. Thus, of the fourteen Congressmen above mentioned, five were "Republican-Nationals," seven "Democratic-Nationals," and but two "Nationals" pure and simple.

The party's national convention was held at Chicago, June 9, 10, 1880, and nominated Jas. B. Weaver, of Iowa, and B. J. Chambers, of Texas, as its presidential candidates. The latter is said to have declined the nomination, but no substitute was appointed. The platform renewed the former Greenback platform, and added various resolutions in favor of the eight-hour law and the sanitary regulation of manufactories, and against Chinese immigration, land grants to railroads, and grants of special privileges to corporations and bondholders. The party's popular vote in the presidential election was 306,867, being about three per cent. of the total vote. The number of Greenback-Labor Congressmen was reduced to eight, four from Missouri, two from Maine, and one each from New York and Texas.

The leaders of the party have been Gilbert De La Matyr, of Indiana; Weaver, and Edward H. Gillette, of Iowa; Hendrick B. Wight, of Pennsylvania; and Solon Chase, Geo. W. Ladd, and Thompson H. Murch, of

Maine. Of these, Chase has never been in Congress; and all the others, except Ladd and Murch, failed to be re-elected in 1880. William D. Kelley, of Pennsylvania, a Republican, was usually considered a Greenback-Labor member until 1880.

The political principles of the party are peculiar in many respects. Its proposition to pay the debt in that which is not money, but a promise to pay money, was a novelty in American politics before 1868, but will probably be renewed at intervals until the final extinction of the debt. Its opposition to banks is in the general line of the strict-construction or Democratic party's history,<sup>1</sup> and has given it most of its Democratic allies. Its proposition that Congress should assume the power to reduce working men's hours of labor, to regulate their sanitary condition, to reduce railroad freights in regulating interstate commerce, and to impose a graduated income tax, is entirely loose-construction in its nature. It is impossible, therefore, to specify any distinctive constitutional basis for the party's future.<sup>2</sup>

THE LIBERAL REPUBLICAN PARTY was an abortive offshoot from the regular Republican party in 1870-72.

Attention is called elsewhere to the destructive influences of the rise of the Republican party in 1855-6 upon the Democratic party of the time.<sup>3</sup> In every State the element represented by such men as William Cullen Bryant, S. P. Chase, Lyman Trumbull, and Montgomery Blair, Democrats by choice, were forced into the new party by the progressively pro-slavery attitude of their natural party.<sup>4</sup>

A re-enforcement of much the same nature was added to the Republican party, after 1861, under the name of "War Democrats." A Peace Democrat in 1864 asserted

<sup>1</sup> See Loco-Foco ; Democratic Party, IV.

<sup>2</sup> See Construction, III.

<sup>3</sup> See Republican Party, I.

<sup>4</sup> See Democratic Party, V.

that a War Democrat and a Republican were only "two links of the same sausage, made out of the same dog"; there was, however, an essential difference, which became gradually more strongly apparent after the end of the Rebellion. The coercive measures which seemed to the dominant party absolutely necessary to the maintenance of the natural rights of Southern negroes,<sup>1</sup> were such as were likely to wean the originally Democratic element from the Republican party; and from 1867 until 1871 there was an increasing exodus of this nature, but not sufficient in numbers to influence seriously the enormous popular vote. The passage of the "Ku-Klux Act" of April 20, 1871, and its enforcement, increased this movement so much that it seemed to need only organization and boundaries to become a perceptible current.

The opportunity was afforded by the success in Missouri of a union of "Liberal Republicans" and Democrats in 1870-71.<sup>2</sup> Its leading features were universal suffrage and universal amnesty, a reform of the tariff and the civil service, and the cessation of "unconstitutional laws to cure Ku-Klux disorders, irreligion, or intemperance."

The leaders of the Missouri fusion, after gaining complete control of their own State, issued a call, January 24, 1872, for a national convention at Cincinnati, May 1st following. In the nature of things the proposed gathering could not be at all representative, for the new party had no organization and no units for representation. The delegates were, therefore, in the main, practically self-appointed; and thus there came into the convention another element, thoroughly honest and patriotic in purpose, but entirely foreign to the natural course of the movement. There was no hope of an independent existence for the new party; it could hardly hope to convert the party which it had left by defeating it: its only logical plan was to organize such a course of transit to the

<sup>1</sup> See Reconstruction, Ku-Klux Klan.

<sup>2</sup> See Missouri.

Democratic party as should put new blood into that party, restore it to its ancient principles, and raise it out of the slough into which it had fallen. But there was also dissatisfaction among Republicans pure and simple; in the growth of that party new men had gained control of it, new methods had been introduced, and the resulting "personal government" of the party had created considerable discontent.

This feeling—the desire to reform, not to defeat, the Republican party—was strongly represented at Cincinnati, and its influence brought the party to an ignominious failure. Its determination not to abandon the protective system caused the introduction of the ridiculously ambiguous tariff utterance; and its determination to follow Republicans only brought about the fatal nomination of Greeley. If the convention had been homogeneous, the tariff utterance would have been clear and consistent, some original Republican of Democratic tendencies would have been nominated for President and some acceptable Democrat for Vice-President, and the ensuing presidential election would at least have been doubtful.

The convention met according to appointment, and selected Carl Schurz, of Missouri, as chairman. A platform in twelve paragraphs was adopted: 1, recognizing the equality of all men before the law; 2, opposing any reopening of the questions settled by the last three amendments; 3, demanding universal amnesty, 4, local self-government, impartial suffrage, and the maintenance of the writ of *habeas corpus*, and 5, civil service reform; 6, "recognizing that there are in our midst honest but irreconcilable differences of opinion with regard to the respective systems of protection and free trade, we remit the discussion of the subject to the people in their congressional districts, and to the decision of Congress thereon, wholly free of executive interference or dictation"; 7–12, calling for the maintenance of public credit,

a return to specie payments, and a cessation of land grants to corporations.

On the first ballot for candidate for President, Charles Francis Adams had 203 votes; Horace Greeley, 147; Lyman Trumbull, of Illinois, 100; B. Gratz Brown, of Missouri, 95; David Davis, of Illinois, 92½; A. G. Curtin, of Pennsylvania, 62; S. P. Chase, 2½, and Charles Sumner, 1. Curtin and Sumner were withdrawn at once; Brown's vote fell to 2 on the following ballots; Davis's vote fell gradually to 6 on the sixth ballot; and Trumbull's rose to 156 on the third ballot, and then fell to 19 at the end. Adams's vote rose on all six ballots, as follows: 203, 233, 264, 279, 309, 324; and Greeley's as follows: 147, 239, 258, 251, 258, 332. Before the sixth ballot was declared, changes made Greeley's vote 482, and Adams's 187. The former was thus nominated. On the second ballot for a candidate for Vice-President, B. Gratz Brown was selected by a vote of 495 to 261 for all others, and the convention adjourned. July 9th, the Democratic National Convention adopted the platform and candidates prepared for it at Cincinnati.<sup>1</sup>

The whole movement had really failed, so evidently that in June the leaders of it endeavored to obtain another convention from which the absolute Republican element should be excluded. June 20th, a meeting was held in New York City, on the call of Carl Schurz, Jacob D. Cox, William Cullen Bryant, Oswald Ottendorfer, David A. Wells, and Jacob Brinkerhoff, and nominated as presidential candidates William S. Groesbeck, of Ohio, and Frederick L. Olmsted, of New York. But it was too late; the new ticket was not heard of after the day of its announcement, and the Greeley campaign went on to its final overwhelming defeat.<sup>2</sup> The result was entirely due to the refusal of Democrats to vote for a candidate who was their lifelong and natural opponent, and whom their

<sup>1</sup> See Democratic Party, pp. 178-205. <sup>2</sup> See Electoral Votes, United States.

leaders had evidently only taken as a stalking horse; the only matter for wonder is that the Democratic proportion of the total vote fell off but three and a half per cent. under the circumstances (1868, 47.3 per cent., 1872, 43.8 per cent.).

Many of those who had originated the movement returned, before or after the election, to the Republican party; others remained in the opposition. The name of the party survived until 1876, owing to the presence of a few Senators and Representatives in Congress who still held to it; but its substance departed with Greeley's defeat, if it had really survived his nomination. The only practical result was the "new departure" of the Democratic party for the future; but it can hardly be supposed that this missionary work was the primary object of the Cincinnati convention.

Authorities should be sought in the current newspapers.

On Nominating Conventions see Stanwood's *History of the Presidency*; McKee's *National Conventions and Platforms*. These two books will give the platforms, candidates, and electoral and popular votes of the various parties for the several years. See, also, Ostrogorski's *Democracy and the Organization of Political Parties*, vol. ii.; Woodburn's *Political Parties and Party Problems in the United States*; Carl Becker's "The Unit Rule in Nominating Conventions," *American Historical Review*, October, 1899; "The Rise and Fall of the Nominating Caucus," *American Historical Review*, January, 1900.

For the Republican Party since 1860, see pp. 212-224, Chapter IX.

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